TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 18[redacted]8

No. [redacted]13.

THOMAS H. PICKFORD AND JOHN H. WALTER, PLAINTIFFS IN ERROR,

vs.

HENRY M. TALBOTT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 24, 1878.

(20,542.)

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SUPREME COURT OF THE UNITED STATES

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In the Court of Appeals of the District of Columbia.

No. 1698.

THOMAS H. PICKFORD ET AL., Appellants,
vs.
HENRY M. TALBOTT.

a Supreme Court of the District of Columbia.

At Law. No. 45662.

HENRY MAURICE TALBOTT, Plaintiff,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration.*

Filed September 27, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45662.

HENRY MAURICE TALBOTT, Plaintiff,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER, Defendants.

First count. The plaintiff Henry Maurice Talbott sues the defendants, Thomas H. Pickford and John H. Walter, for that whereas the plaintiff is and was at the time of the committing of the grievances hereafter complained of the incumbent of the office of The State's Attorney for the County of Montgomery, in the State of Maryland, to which he was elected by the lawful voters thereof, and as such officer, was always reputed, among the citizens of said County and State, as well as among other citizens of the United States elsewhere, and deservedly so reputed, to be upright, honest, just and faithful in the performance of the public duties imposed upon him by his oath

of office and the laws of the State of Maryland, in the prosecution before the Grand and Petit Juries of said County and the Courts thereof and of the State, of persons lawfully arrested, accused and indicted for crimes and misdemeanors committed within said county against the laws of said State. Yet the defendants well knowing the premises, but contriving to deprive the plaintiff of his said
2 good name, credit and reputation in the conduct of the said office and to bring him into scandal and disrepute among his friends, neighbors and associates and with the citizens of the State of Maryland and other citizens of the United States, and to injure him in his said office and to bring him to ruin, did heretofore, to wit, on or about the seventh day of December, A. D. 1901, in the city of Washington, District of Columbia, falsely and maliciously compose and publish of and concerning the plaintiff in regard to his conduct of his said office, the following false, scandalous, defamatory and malicious libel, to wit: "That H. Maurice Talbott, State's Attorney of Montgomery Co. Md., (meaning the plaintiff in his said office) "has by his association with the indicted "blackmailers, Hud- "son and Hopp, disgraced himself, his county, his profession and the "high office he holds, is fully shown by his own statement, under "oath, that he gave large sums of money to a witness before the "Grand Jury of his county," (meaning thereby that the plaintiff as State's Attorney for Montgomery County, as aforesaid, gave large sums of money to a witness before the Grand Jury of Montgomery County, State of Maryland, to corruptly influence said witness) "said witness" (meaning thereby, the said Hudson) "being a stranger to him" (meaning thereby the plaintiff) "until Talbott" (meaning the plaintiff) "took him before the Grand Jury is also shown."

By means of the publishing of which said false, scandalous and malicious libel and libelous matter by the defendants, the plaintiff is not only hurt and prejudiced in his good name, fame, credit and esteem in the conduct of his said office among the citizens of
3 the State of Maryland and the District of Columbia and elsewhere, but is also fallen in great discredit among them in that respect, to the damage of the plaintiff in the sum of Twenty-five Thousand Dollars; and the plaintiff claims the sum of Twenty-five Thousand Dollars together with costs of suit.

Second count. The plaintiff, Henry Maurice Talbott, sues the defendants, Thomas H. Pickford and John H. Walter, for that, whereas, the plaintiff is and at the time of the happening of the grievances hereafter complained of was the incumbent of the office of the State's Attorney for the County of Montgomery, in the State of Maryland, to which he was elected by the lawful voters thereof, and as such officer was always reputed among the citizens of said county and state, as well as among other citizens of the United States elsewhere, and deservedly so reputed, to be upright, honest just and faithful in the performance of the public duties imposed upon him by his oath of office and the laws of the State of Maryland, in the prosecution before the Grand and Petit Juries of said county, and the Courts thereof and of the said state, of persons lawfully arrested, accused and indicted for crimes and misdemeanors committed within

said county against the laws of said state, and was also at the time of the committing and happening of said grievances a practicing attorney before the courts of the said State of Maryand and before the Supreme Court of the District of Columbia and elsewhere, and was of good repute and reputation in his said profession. Yet the defendants well knowing the premises, but contriving to deprive the plaintiff of said good name, credit and reputation in the con-
4 duct of his said office, and in the practice of his said profession, and as a citizen, and to bring him into scandal and disrepute among his friends, neighbors and associates, and with the citizens of the State of Maryland and other citizens of the United States, and to injure him in his said office and in the practice of his said profession, and in his reputation as a citizen, and to bring him to ruin therein, did, heretofore, to wit, on or about the 8th day of December, A. D. 1901, falsely and maliciously procure to be published, in a certain newspaper published and circulated in the city of Washington, District of Columbia, and circulated in the State of Maryland and elsewhere in the United States, known as the Sunday Globe, of and concerning the plaintiff in his office aforesaid and in his profession aforesaid, and as a private citizen as aforesaid, the following false, malicious and defamatory libel, to wit:

"*History of a Crime.*

In which District Attorney Talbott of Maryland Enacts a Leading Role.

The Vindication of the Reputable Washington Citizens, Messrs. Pickford and Walter *et al.*, and the Indictment by the District Grand Jury of Two of the Conspirators, a Sensational Case which Exemplifies the Old Adage that "Truth is Stranger than Fiction."

The people of Washington city were somewhat surprised on learning from a press dispatch in the early part of last March that four respectable citizens of the District of Columbia had been indicted by the grand jury of Montgomery county, Maryland, on the
5 charge of arson. This is one of the most abhorrent of crimes, and at common law is punishable with death.

Any man who has seen the flames of a burning house redden the sky at night will recall that the face of every spectator of the lurid scene looked like a tragedy.

The gentlemen who were thus gravely accused were Thomas H. Pickford, the well known grocer and provision dealer; John H. Walter, one of our leading operators in real estate, Aaron Bradshaw and Granviss C. Shaw, also highly respected business men. That our readers may clearly see the true inwardness of the criminal scheme that culminated in this nefarious indictment and that the actors in it may be unmasked, we shall state the facts as we have learned them after a thorough investigation. In so doing we shall follow our invariable rule to hew close to the line of truth, it matters not in whose face the chips may fly.

In May, 1897, Messrs. Pickford and Walter purchased a spacious mansion built of brick and stone, with the ground on which it was located at Four Corners in Montgomery County, Md. It was an *ambitious* structure, on which, its owner had expended, as he claimed, about fifty thousand dollars, and it was unfinished when he sold it, but insured for thirty thousand dollars, the risk being divided between seven or eight companies in Baltimore. It was burned down on the night of September 13, 1897, during the temporary absence of the man who occupied it as caretaker.

In due course of time Messrs. Pickford and Walter claimed the insurance under the policies which had been legally assigned
6 to them as owners of the premises, the aggregate amount of which they had on renewal of some of them reduced to twenty-seven thousand dollars, although they had expended a considerable sum on the building.

The companies, as usual, demurred to payment on the ground that there had been an overvaluation of the property, and after some delay Messrs. Pickford and Walter, to avoid a long and costly litigation, agreed to settle for twenty-one thousand dollars, which sum was paid. Two years later one James Hudson, an old man of cloudy reputation who had been connected with several schemes in this city, one of which led to his being severely drubbed by a member of the District bar, stated to an adjuster of one of the companies that he could prove that the house was burned at the instance of Messrs. Pickford and Walter, and that Messrs. Bradshaw and Shaw were parties to the criminal scheme. The companies laid the matter before Mr. Kilgore, then District attorney in Montgomery County, Md., an able lawyer and man of honor, who, on examination of Hudson and his pretended proofs, decided that there was no legal evidence to support the charge, and he refused to institute a prosecution of the parties accused.

Mr. Kilgore was succeeded by Maurice H. Talbott. He conferred with the unsavory Hudson, at Rockville, Md., and at his room in Washington and the latter was heard to say that something was "about to drop" on Messrs. Pickford and Walter. About April 2d, one F. Hopp then proprietor of the 20th Century Café, called upon Mr. Pickford at his office and told him that he could arrange matters with Hudson, so he would not appear and testify in the arson
7 case, and would retract the charge that he had made for a consideration. Hudson it should be stated had a small printing plant, and was printing the menus for Hopp's Café, and he held a mortgage for seventy-five dollars on the plant. On the other hand Hopp who had been buying groceries and provisions at Mr. Pickford's store, had become indebted to him so far that Mr. Pickford refused to credit him any further, and held his note for $250 for the balance due on his account. To draw him on and develop the scheme of black-mail that Mr. Pickford suspected lay at the bottom of Hopp's proposal, he gave him at the latter's instance a receipt in full for his account, but prudently retained his note.

The following day Hopp and Hudson were seen riding out of town together in a buggy, going into Montgomery county. On

their return Mr. Pickford made an engagement for Hopp to call at his office on the next day. In the meantime he consulted the district attorney, and by his advice saw Captain Boardman, the chief of the detective bureau, and arranged with him to have two skilled detectives secreted behind a screen, so as to overhear Hopp's proposal. That mercenary arrived on time and stated that the insurance companies were to pay Hudson $11,000 to secure the conviction of Pickford; that Talbott would also be paid, and that Hudson had agreed to settle up the whole matter for $10,000. Mr. Pickford stated that he had not that sum in hand, and after some adroit parleying on his part, in which Hopp made the admission that all but $1,500, which was for himself was to be divided between Maurice Talbott and Hudson, Hopp accepted $600 and a note for $3,000 payable in thirty days. The money was paid in marked
8 bills, and the detectives who had stood within three feet of Hopp during the interview and heard all that was said, followed him to his café, where he joined Hudson, who was awaiting him, and arrested both of them on a warrant for conspiracy, which Pickford had already sworn out. At the preliminary hearing in the police court Talbott, who was summoned as witness for the government, admitted reluctantly that the indictment was had upon the testimony of Hudson, as the prosecuting witness, and that he had from time to time supplied him with money and had paid $75 to lift the mortgage that Hopp held on Hudson's printing plant.

The charge of conspiracy being sustained, they were held to await the action of the grand jury, the bond fixed at $2,000. Hopp secured a professional bondsman by the payment of $100, but Hudson was committed to jail in default of bail. After he had been confined in jail for several days, Hopp's counsel telephoned Talbott that he was threatening to abandon the arson case, unless he was bailed, and Talbott then procured a bondsman for him.

The grand jury promptly returned a bill against Hudson and Hopp for conspiracy and they are now awaiting trial. We should state that shortly prior to the arrest of the two conspirators a requisition was issued by the Governor of Maryland on the Chief Justice of the Supreme Court of the District for the extradition of Messrs. Pickford, Walter, and their co-defendants, on hearing of which Mr. Pickford decided not to contest the proceeding, but to demand a trial on the merits of the case, and he hastened to Rockville and gave bail in the sum of three thousand dollars for his due appearance at court.

9 The other parties by advice of counsel, came forward and submitted to arrest, and then secured a writ of *habeas corpus* to test the legality of the extradition proceedings. After a full hearing, at which the State of Maryland was represented by Assistant United States District Attorney Semmes, Justice Bradley decided upon the law and the evidence that there was no legal proof to support the charge that the petitioners had committed a crime in Maryland and were fugitives from justice, and he accordingly discharged them from custody.

Soon after this Hopp's note being due and unpaid, Mr. Pickford

brought suit against him and his endorser on the note, G. M. Mann, before Justice of the Peace Bunday.

At the trial of this suit Mr. Lipscomb Hudson's counsel in the conspiracy case, made the unheard of request that he should be permitted to appear as attorney for Hudson to prevent his committing himself, as he was to testify as a witness for Hopp. The request was granted and whenever Mr. Pickford's attorney put a question to Hudson to elicit from him some fact regarding the indictment of Mr. Pickford, Hudson, prompted by Lipscomb, refused to answer on the ground that he might criminate himself. He, however, admitted that the insurance companies were to pay a reward of $11,500 for the conviction of Mr. Pickford and that he had no personal acquaintance either with Pickford or Walter, and had never even seen the former until he appeared on the witness stand in the police court. Hopp's defense against the note was that he had paid it by services rendered in negotiating the settlement of the arson case with Hudson. It was as unique a piece of audacity as that of a
10 prisoner in a court in France who having been convicted of murdering his parents to secure their property, when he was arraigned for judgment he pleaded that he was an orphan in mitigation of sentence. Justice Bundy rendered judgment against Hopp and his endorser, holding that the receipt was not a legal discharge, as it was given under a threat and in pursuance by Hopp of an unlawful scheme.

We should state the unquestionable fact that during the trial, Talbott appeared just outside of the court room, in quite a state of mind, and sent in for Hudson, who went out and conferred privately with him, the overzealous District Attorney evidently thinking that this pension witness needed bracing to keep him up to "the sticking point."

Mr. Pickford appeared from time to time in court at Rockville with his counsel Samuel Maddox, Esq., and demanded a trial, but Talbott on each occasion had the case continued on the plea that a material witness was absent. Finally the case was set down for trial on November 22 last, and on its being called Mr. Pickford appeared at the bar of the court and announced that he was ready for trial. Again Talbott declared that he was not ready, whereupon Judge Henderson brought him up with a round turn, stating that it was his duty to be ready at the first day of the term, and he must proceed or dismiss the case in justice to the defendant Mr. Pickford. His associate Judge Motter concurred with Judge Henderson, and said "My experience in this court has been that parties under indictment have generally sought to defer their trials, but the defendant in this case has persistently demanded a trial that he might meet his accuser face to face." The District Attorney there-
11 upon by leave of the court, entered a *nol. pros.* and the great conspiracy thus came to an inglorious end.

The vindication of Mr. Pickford was thus emphasized by the very official who had resorted to such extraordinary means to fasten upon him such a terrible crime. The District Attorney must be conscious, in view of the tools he made use of, the facts developed in the courts

of this district and his repeated failures to face the music in a trial of the issues that he comes out of this affair shorn of even the excuse of over-zealousness. His inability to even make a plausible case, condemned by the honorable judges of his own state and district, places Mr. Talbott in a very unenviable light indeed, from the public and legal point of view. The insurance companies' death grip on the district attorney to secure the return of the money justly paid out is as evident as the treacherous character of the testimony he relied upon to destroy the reputation of honorable men and blast forever characters, which in this community stand unimpeached; and are unimpeachable by even a Maryland district attorney." the defendants meaning by the words, sentences, paragraphs and the whole scope, tenor and language of the said false, malicious scandalous and defamatory libel, to charge that the plaintiff had in the conduct of his office of The State's Attorney for the County of Montgomery, in the State of Maryland, and in the practice of his profession as a lawyer, and as a citizen, been guilty of procuring the said Thomas H. Pickford, John H. Walter, Aaron Bradshaw and Granville C. Shaw to be wrongfully and unjustly indicted for the unlawful burning of a dwelling house in the said Montgomery County, and
12 to wrongfully accuse them before the Grand Jury of said County of being guilty of crime, and the defendants meaning by the said false, scandalous, malicious and defamatory libel to charge that the plaintiff had wrongfully and corruptly leagued and conspired with the said Hudson and the said Hopp, named in the said libel, and with the insurance companies named in said libel, to accuse the said Pickford, Walter, Bradshaw and Shaw of crime, for the purpose of assisting the insurance companies aforesaid to extract illegally money from the said Pickford, Walter, Bradshaw and Shaw aforesaid, and meaning by the language and tenor of the said defamatory libel to charge the plaintiff with conspiring to agree with the said Hudson and the said Hopp and the said insurance companies to wrongfully and corruptly procure the conviction of the said Pickford, Bradshaw, Walter and Shaw in the said County of Montgomery, for the purpose of receiving from the said insurance companies large sums of money on the part of the plaintiff and the said Hopp and the said Hudson, meaning by the said false, malicious and defamatory libel to charge the plaintiff with misconduct in his office by corruptly associating with indicted blackmailers, so-called, Hudson and Hopp, and with lending them aid and comfort.

The defendants meaning by the following statements in the said libel by them published, to wit: "The companies" (meaning the insurance companies) "laid the matter before Mr. Kilgore, then "District Attorney in Montgomery County, Md.," (meaning Mr. Kilgour, then State's Attorney for Montgomery County) "an able
"lawyer and a man of honor, who, on examination of Hud-
13 "son and his pretended proofs, decided That there was no
"legal evidence to support the charge and refused to insti-
"tute a prosecution of the parties accused. Mr. Kilgore" (meaning the said then State's Attorney for Montgomery County) "was sue-

"ceeded by Maurice H. Talbott" (meaning he was succeeded by the plaintiff in the said office of State's Attorney). "He" (meaning the plaintiff) "conferred with the unsavory Hudson at Rockville, "Md., and at his room in Washington, and the latter was heard to "say that something was 'about to drop' on Messrs. Pickford and "Walter;" meaning thereby to charge that the plaintiff had conferred with the said Hudson, and that he, Talbott, was to corruptly and unjustly *to* take some legal action in his said office against the said Pickford and Walter; that the defendants in another part of the said false and malicious libel hereinbefore set forth, stated the following: "The following day Hopp and Hudson were seen riding "out of town together in a buggy, going into Montgomery County." (meaning to assert thereby that they were going to consult the plaintiff.) "On their return Mr. Pickford "made an engagement for Hopp to call at his office the "next day. In the meantime he consulted the district at-"torney, and by his advice saw Captain Boardman, the "chief of the detective bureau, and arranged with him to have two "skilled detectives secreted behind a screen, so as to overhear Hopp's "proposal. That mercenary arrived on time and stated that the in-"surance companies were to pay Hudson $11,000 to secure the con-"viction of 'Pickford; that Talbott would also be paid,' "—meaning to charge the plaintiff with misconduct in office and with colleaguing and conspiring to receive money for the conviction of the said
14 Pickford. And the defendants, further on in the said libel use the following language: "Hopp secured a professional "bonds-man by the payment of $100, but Hudson was committed "to jail in default of bail." "After he had been confined in jail "for several days, Hudson's counsel telephoned Talbott," (meaning the plaintiff) "That he" (Hudson) "was threatening to abandon the "arson case, unless he was bailed, and Talbott then procured a "bondsman for him;" the defendants meaning by these words to charge misconduct in office on the said Talbott in so procuring bail.

Further on in said libel the following words are used: "We would "state the unquestionable fact that during the trial Talbott" (meaning the plaintiff) "appeared just outside the court room in quite a "state of mind, and sent for Hudson, who went out and conferred "privately with him, the overzealous district attorney evidently "thinking that this pension witness needed bracing to keep him up "to the 'sticking point,' " meaning to charge him, the plaintiff, with being influenced by improper motives in the conduct of his office; and meaning to assert by the language "that this pension witness "needed bracing to keep him up to the 'sticking point,' " to charge the plaintiff with misconduct in office and to charge him with corruptly using the said witness.

Further on in the said printed libel the following words occur: "The vindication of Mr. Pickford was thus emphasized by the very "official who had resorted to such extraordinary means to fasten "upon him such a terrible crime;" the defendants meaning
15 thereby to charge the plaintiff with misconduct in office, and with the use of illegal and corrupt and extraordinary meas-

ures to fasten upon the said Pickford the crime of which the said Pickford was innocent. Further on in said libel the following words appear: "The District Attorney" (meaning the plaintiff) "must be "conscious, in view of the tools he made use of, the facts developed "in the courts of this District, and his repeated failures to face the "music in a trial of the issues that he comes out of this affair shorn "of the excuse of even over-zealousness;" the defendants meaning thereby to charge the plaintiff with corruption and misconduct in his said office; and further on in said printed libel so set forth the following words occur: "The insurance companies' death grip on the "district attorney to secure the return of the money justly paid out "is as evident as the treacherous character of the testimony he" (meaning the plaintiff) "relied upon to destroy the reputation of "honorable men and blast forever characters, which in this com-"munity stand unimpeached;" the defendants meaning thereby to charge official misconduct on the plaintiff, and to charge that in the conduct of his office and in respect to matters therein set forth, he was influenced by the insurance companies corruptly.

By reason and means of the publishing of which false, scandalous and malicious libel and libelous matters by the defendants, the plaintiff is not only hurt in his good name, fame, credit and esteem in his position as the said State's Attorney of Montgomery County, Maryland, and among the citizens of said State, and of the District of Columbia and elsewhere, but is also fallen in great discredit among them in that respect, to the damage of the plaintiff
16 in the sum of Twenty-five Thousand Dollars; and the plaintiff claims the sum of Twenty-Five Thousand Dollars together with costs of suit.

Third Count: The plaintiff, Henry Maurice Talbott, sues the defendants, Thomas H. Pickford and John H. Walter, for that, whereas the plaintiff is and was at the time of the committing of the grievances hereafter complained of The State's Attorney for the County of Montgomery in the State of Maryland, an elective office in the said State under the laws thereof and with obligations and duties required by law and was also a practicing attorney at law, admitted to practice in the Courts of said State of Maryland and of the District of Columbia and actively engaged in the practice of his profession therein, and of good name, credit and esteem in his office and profession among the citizens of Maryland and the District of Columbia and good citizens of the United States elsewhere.

That the office of State's Attorney for the County of Montgomery could only be filled by a lawyer.

That among the duties of the said plaintiff as said State's Attorney was the prosecution before the proper courts of said County, and before the Grand and Petit Jury of said County, of all persons accused, arrested or indicted for crimes or misdemeanors against the laws of the State of Maryland, committed in the said County or lawfully to be prosecuted therein. That at the time of the committing of the grievances hereinafter complained of there was pending in the proper courts of the said County and State an indictment for crime and misdemeanor against one Thomas H. Pickford, one John H.

Walter, one Aaron Bradshaw and one Granville C. Shaw,
17 for an offense against the laws of the said State and County, for the unlawful burning of a certain house located in said County and State, said indictment being lawfully found by the proper Grand Jury of said County.

That one James Hudson was a witness before the Grand Jury upon whose evidence said indictment was found. That said Pickford appeared and gave bail in the sum of Three Thousand Dollars for his appearance for trial for said indictment. That the other defendants, John H. Walter, Aaron Bradshaw and Granville C. Shaw did not appear to answer the said indictment but resisted the same by legal technicalities before the Supreme Court of the District of Columbia, to whose Chief Justice, under the law, application had been made by the proper authorities of the State of Maryland on said indictment by requisition under the Constitution of the United States and that said requisition was refused by the lawful authorities of the District of Columbia.

That the said Thomas H. Pickford and John H. Walter afterwards procured a warrant to be sworn out before the Police Court of the District of Columbia charging the said witness James Hudson and one Hopp with conspiracy together in attempting to procure money from the said Pickford in falsely accusing the said Pickford, Walter, Bradshaw and Shaw with the crime of burning a dwelling house in Maryland, and there was a hearing on said warrant in the Police Court of the District of Columbia wherein the said Pickford appeared as a witness and afterwards the said Pickford brought a
suit at law in the District of Columbia before one Charles
18 Bundy, a justice of the peace in and for the said District, on a certain promissory note said to have been given by said Hopp and endorsed by one Mann to the order of said Pickford and on the trial of said cuase before said Bundy the said Hopp was a witness and the said Hudson was called, sworn, examined and gave testimony as did the said Pickford.

And the said proceedings and premises were all well known to the defendants Pickford and Walter, yet well knowing the same but contriving to deprive the plaintiff of his good name and credit in his said office and in his said profession as a lawyer and as a citizen, and to injure him in these respects in the opinion of the public both in the State of Maryland and in the District of Columbia and elsewhere and to bring him to ruin therein, did, on or about the 8th day of December, A. D. 1901, falsely and maliciously procure to be published in a certain newspaper published in the city of Washington, District of Columbia, and circulated in the District of Columbia and in the State of Maryland and elsewhere, said paper being known as the Sunday Globe, of and concerning the plaintiff in his said office aforesaid and in his profession aforesaid and of him as a citizen aforesaid, the following false, scandalous and malicious libel, to wit:

"History of a Crime.

In Which District Attorney Talbott, of Maryland, Enacts a Leading Role.

19 The people of Washington City were somewhat surprised on learning from a press dispatch in the early part of last March that four respectable citizens of the District of Columbia had been indicted by the grand jury of Montgomery County, Maryland, on the charge of arson. This is one of the most abhorrent of crimes, and at common law is punishable with death.

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The gentlemen who were thus gravely accused were Thomas H. Pickford, the well known grocer and provision dealer; John H. Walter, one of our leading operators in real estate, Aaron Bradshaw and Granville C. Shaw, also highly respected business men. That our readers may clearly see the true inwardness of the criminal scheme that culminated in this nefarious indictment and that the actors in it may be unmasked, we shall state the facts as we have learned them after a thorough investigation. In so doing we shall follow our invariable rule to hew close to the line of truth, it matters not in whose face the chips may fly.

In May, 1897, Messrs. Pickford and Walter purchased a spacious mansion built of brick and stone, with the ground on which it was located at Four Corners in Montgomery County, Md. It was an *ambitious* structure, on which, its owner had expended, as he claimed, about fifty thousand dollars, and it was unfinished when he sold it, but insured for thirty thousand dollars, the risk being divided between seven or eight companies in Baltimore. It
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parties to the criminal scheme. The companies laid the matter before Mr. Kilgore, then District attorney in Montgomery County, Md., an able lawyer and man of honor, who, on examination of Hudson and his pretended proofs, decided that there was no legal evidence to support the charge, and he refused to institute a prosecution of the parties accused.

Mr. Kilgore was succeeded by Maurice H. Talbott. He conferred with the unsavory Hudson, at Rockville, Md., and at his room
21 in Washington and the latter was heard to say that something was "about to drop" on Messrs. Pickford and Walter. About April 2d, one F. Hopp, then proprietor of the 20th Century Cafe, called upon Mr. Pickford at his office and told him that he could arrange matters with Hudson, so he would not appear and testify in the arson case, and would retract the charge that he had made for a consideration. Hudson it should be stated had a small printing plant, and was printing the menus for Hopp's Cafe, and he held a mortgage for seventy-five dollars on the plant. On the other hand Hopp who had been buying groceries and provisions at Mr. Pickford's store, had become indebted to him so far that Mr. Pickford refused to credit him any further, and held his note for $250 for the balance due on his account. To draw him on and develop the scheme of black-mail that Mr. Pickford suspected lay at the bottom of Hopp's proposal, he gave him at the latter's instance a receipt in full for his account, but prudently retained his note.

The following day Hopp and Hudson were seen riding out of town together in a buggy, going into Montgomery county. On their return Mr. Pickford made an engagement for Hopp to call at his office on the next day. In the meantime he consulted the district attorney, and by his advice saw Captain Boardman, the chief of the detective bureau, and arranged with him to have two skilled detectives secreted behind a screen, so as to overhear Hopp's proposal. That mercenary arrived on time and stated that the insurance companies were to pay Hudson $11,000 to secure the conviction of Pickford; that Talbott would also be paid, and that Hudson had agreed to settle up the whole matter for $10,000. Mr. Pick-
22 ford stated that he had not that sum in hand, and after some adroit parleying on his part, in which Hopp made the admission that all but $1,500, which was for himself was to be divided between Maurice Talbott and Hudson, Hopp accepted $600 and a note for $3,000 payable in thirty days. The money was paid in marked bills, and the detectives who had stood within three feet of Hopp during the interview and heard all that was said, followed him to his café, where he joined Hudson, who was awaiting him, and arrested both of them on a warrant for conspiracy, which Pickford had already sworn out. At the preliminary hearing in the police court Talbott, who was summoned as a witness for the government, admitted reluctantly that the indictment was had upon the testimony of Hudson, as the prosecuting witness, and that he had from time to time supplied him with money and had paid $75 to lift the mortgage that Hopp held on Hudson's printing plant.

The charge of conspiracy being sustained, they were held to await

the action of the grand jury, the bond fixed at $2,000. Hopp secured a professional bondsman by the payment of $100, but Hudson was committed to jail in default of bail. After he had been confined in jail for several days, Hopp's counsel telephoned Talbott that he was threatening to abandon the arson case, unless he was bailed, and Talbott then procured a bondsman for him.

The grand jury promptly returned a bill against Hudson and Hopp for conspiracy and they are now awaiting trial. We should state that shortly prior to the arrest of the two conspirators a requisition was issued by the Governor of Maryland on the Chief
23 Justice of the Supreme Court of the District for the extradition of Messrs. Pickford, Walter, and their co-defendants, on hearing of which Mr. Pickford decided not to contest the proceeding, but to demand a trial on the merits of the case, and he hastened to Rockville and gave bail in the sum of three thousand dollars for his due appearance at court.

The other parties by advice of counsel, came forward and submitted to arrest, and then secured a writ of *habeas corpus* to test the legality of the extradition proceedings. After a full hearing, at which the State of Maryland was represented by Assistant United States District Attorney Semmes, Justice Bradley decided upon the law and the evidence that there was no legal proof to support the charge that the petitioners had committed a crime in Maryland and were fugitives from justice, and he accordingly discharged them from custody.

Soon after this Hopp's note being due and unpaid, Mr Pickford brought suit against him and his endorser on the note, G. M. Mann, before Justice of the Peace Bundy.

At the trial of this suit, Mr. Lipscomb Hudson's counsel in the conspiracy case, made the unheard of request that he should be permitted to appear as attorney for Hudson to prevent his committing himself, as he was to testify as a witness for Hopp. The request was granted and whenever Mr. Pickford's attorney put a question to Hudson to elicit from him some fact regarding the indictment of Mr. Pickford, Hudson, prompted by Lipscomb, refused to answer on the ground that he might criminate himself. He, however, admitted that the insurance companies were to pay a reward of $11,500 for the conviction of Mr. Pickford and that he had
24 no personal acquaintance either with Pickford or Walter, and had never even seen the former until he appeared on the witness stand in the police court. Hopp's defense against the note was that he had paid it by services rendered in negotiating the settlement of the arson case with Hudson. It was as unique a piece of audacity as that of a prisoner in a court in France who having been convicted of murdering his parents to secure their property, when he was arraigned for judgment he pleaded that he was an orphan in mitigation of sentence. Justice Bundy rendered judgment against Hopp and his endorser, holding that the receipt was not a legal discharge, as it was given under a threat and in pursuance by Hopp of an unlawful scheme.

We should state the unquestionable fact that during the trial,

Talbott appeared just outside of the court room, in quite a state of mind, and sent in for Hudson, who went out and conferred privately with him, the overzealous District Attorney evidently thinking that this pension witness needed bracing to keep him up to "the sticking point."

Mr. Pickford appeared from time to time in court at Rockville with his counsel Samuel Maddox, Esq., and demanded a trial, but Talbott on each occasion had the case continued on the plea that a material witness was absent. Finally the case was set down for trial on November 22 last, and on its being called Mr. Pickford appeared at the bar of the court and announced that he was ready for trial. Again Talbott declared that he was not ready, whereupon Judge Henderson brought him up with a round turn, stating that it was his duty to be ready at the first day of the term, and he must proceed or dismiss the case in justice to the defendant Mr.
25 Pickford. His associate Judge Matter concurred with Judge Henderson, and said "My experience in this court has been that parties under indictment have generally sought to defer their trials, but the defendant in this case has persistently demanded a trial that he might meet his accuser face to face." The District Attorney thereupon by leave of the court, entered a *nol. pros.* and the great conspiracy thus came to an inglorious end.

The vindication of Mr. Pickford was thus emphasized by the very official who had resorted to such extraordinary means to fasten upon him such a terrible crime. The District Attorney must be conscious, in view of the tools he made use of, the facts developed in the courts of this District and his repeated failures to face the music in a trial of the issues that he comes out of this affair shorn of even the excuse of over-zealousness. His inability to even make a plausible case, condemned by the honorable judges of his own state and district, places Mr. Talbott in a very unenviable light indeed, from the public and legal point of view. The insurance companies' death grip on the district attorney to secure the return of the money justly paid out is as evident as the treacherous character of the testimony he relied upon to destroy the reputation of honorable men and blast forever characters, which in this community stand unimpeached; and are unimpeachable by even a Maryland district attorney." The defendants, meaning by the words, sentences and paragraphs, and the whole scope, tenor and language of the said false, malicious scandalous and defamatory libel, to charge that the plaintiff
26 had in his office of the State's Attorney for the County of Montgomery in the State of Maryland, and in the practice of his profession as a lawyer, and as a citizen, been guilty of procuring the said Thomas H. Pickford, John H. Walter, Aaron Bradshaw and Granville C. Shaw to be wrongfully and unjustly indicted for the unlawful burning of a dwelling house in said Montgomery County and to wrongfully accuse them before the Grand Jury of said County of being guilty of crime, and the defendants meaning by the said false, scandalous, malicious and defamatory libel to charge that the plaintiff had wrongfully and corruptly leagued and conspired with the said Hudson and Hopp, named in said libel, to

accuse the said Pickford, Walter, Bradshaw and Shaw of crime, for the purpose of assisting the insurance companies aforesaid to extract illegally, money from the said Pickford, Walter, Bradshaw and Shaw aforesaid, and meaning by the language and tenor of the said defamatory libel to charge the plaintiff with conspiring to agree with the said Hudson and the said Hopp and the said insurance companies to wrongfully and corruptly procure the conviction of the said Pickford, Bradshaw, Walter and Shaw in the said County of Montgomery, for the purpose of receiving from the said insurance companies large sums of money on the part of the plaintiff and the said Hopp and the said Hudson, meaning by said false, scandalous and defamatory libel to charge the plaintiff with misconduct in his office by corruptly associating with indicted blackmailers, so-called, Hudson and Hopp, and with lending them aid and comfort.

The defendants meaning by the following statements in
27 the said libel by them published, to wit: "The companies, (meaning the insurance companies) "laid the matter before Mr. Kilgore, then the District Attorney in Montgomery "County, Md., (meaning Mr. Kilgour, then State's Attorney for Montgomery County) "an able lawyer and a man of honor, who, on examination "of Hudson and his pretended proofs, decided that there was no "legal evidence to support the charge and refused to institute a "prosecution of the parties accused. Mr. Kilgore, (meaning the said then State's Attorney for Montgomery County) was "succeeded "by Maurice H. Talbott, (meaning that he was succeeded by the "plaintiff in the office of States Attorney) "He," (meaning the plaintiff) "conferred with the unsavory Hudson at Rockville, Md., "and at his room at Washington, and the latter was heard to say "that something was 'about to drop' on Messrs. Pickford and Walter;" meaning thereby to charge that the plaintiff had conferred with the said Hudson, and that he, Talbott, was corruptly and unjustly to take some legal action in his said office against the said Pickford and Walter; That the defendants in another part of the said false and malicious libel hereinbefore set forth, stated the following: "That the following day Hopp and Hudson were seen rid- "ing out of town in a buggy, going into Montgomery County," (meaning to assert thereby that they were going to consult the plaintiff). "On their return Mr. Pickford made an engagement for Hopp to call at his office on the next day. In the meantime he consulted the district "attorney, and by his advice saw Captain Boardman, the
"chief of the detective bureau, and arranged with him to
28 "have two skilled detectives secreted behind a screen, so "as to overhear Hopp's proposal." "That mercenary arrived "on time and stated that the insurance companies were to pay Hud- "son $11,000 to secure the conviction of Pickford; that Talbott "would also be paid,"—meaning by this to charge the plaintiff with misconduct in office and with colleaguing and conspiring to receive money for the conviction of the said Pickford. And the defendants, further on in said printed libel used the following language: "Hopp secured a professional bondsman by the payment of $100, "but Hudson was committed to jail in default of bail. After he

"had been confined in jail for several days, Hudson's counsel tele-
"phoned Talbott, (meaning the plaintiff) "that he was threatening
"to abandon the arson case unless he was bailed, and Talbott then
"procured a bondsman for him;" the defendants meaning by these words to charge misconduct in office on the said Talbott in so securing bail.

Further on in said libel the following words are used: "We should "state the unquestionable fact that during the "trial Talbott," (meaning the plaintiff) "appeared just outside the Court room in "quite a state of mind, and sent in for Hudson who went out and "conferred privately with him, the overzealous district attorney evi-"dently thinking that this pension witness needed bracing up to "keep him up to the 'sticking point,'" meaning to charge him, plaintiff, with being overzealous, meaning to charge him, plaintiff, with being influenced by improper motives in the conduct of his said office; and meaning to assert by the language, "That this
29 pension witness needed bracing up to keep him up to the sticking point," to charge the plaintiff with misconduct in office and to charge him with corruptly using the said witness.

Further on in the said printed libel the following words occur: "The vindication of Mr. Pickford was thus emphasized by the very "official who had resorted to such extraordinary means to fasten "upon him such a terrible crime;" the defendant meaning thereby to charge the plaintiff with misconduct in office, and with the use of illegal and corrupt and extraordinary measures to fasten upon the said Pickford the crime of which the said Pickford was innocent. Further on in said libel the following words appear: "That District Attorney" (meaning the plaintiff) "must be conscious, in view of "the tools he made use of the facts developed in the courts of this "District, and his repeated failures to face the music in a trial of "the issues that he comes out of this affair shorn of even the excuse "of overzealousness;" that defendants meaning thereby to charge the plaintiff with corruption and misconduct in his said office; and further on in said printed libel so set forth the following words occur: "That insurance companies' death grip on the district attorney to "secure the return of the money justly paid out is as evident as the "treacherous character of the testimony he," (meaning the plaintiff) "relied upon to destroy the reputation of honorable men and "blast forever characters which in this community stand unim-"peached;" the defendants meaning thereby to charge official misconduct on the plaintiff and to charge that in the conduct of
30 his office and in respect to the matters therein set forth he was influenced by the insurance companies corruptly.

By reason and means of the publishing of which false, scandalous and malicious libel and libelous matters, by the defendants, the plaintiff is not only hurt and prejudiced in his good name, fame, credit and esteem in his position as the State's Attorney of Montgomery County, Maryland, and among the citizens of the said state and of the District of Columbia and elsewhere, but is also fallen into great discredit among them in that respect, to the damage of the plaintiff in the sum of Twenty-five Thousand Dollars; and the plain-

tiff claims the sum of Twenty-five Thousand Dollars together with costs of suit.

ANDREW A. LIPSCOMB,
Attorney for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day exclusive of Sundays and legal holidays occurring after service hereof; otherwise judgment.

ANDREW A. LIPSCOMB,
Attorney for Plaintiff.

31 *Joint and Several Pleas of Defendants.*

Filed October 20, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45662.

HENRY MAURICE TALBOTT, Plaintiff,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER, Defendants.

1. For plea to the first count of the declaration, these defendants say they are not guilty in manner and form as therein alleged.
2. For plea to the second count of the declaration, these defendants say they are not guilty in manner and form as therein alleged.
3. For plea to the third count of the declaration, these defendants say they are not guilty in manner and form as therein alleged.

SAM. MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Defendants.

Service copy of above pleas acknowledged this 20" day of October 1902.

A. A. LIPSCOMB,
By W. S. McKEAN.

32 *Joinder in Issue.*

Filed October 29, 1902.

In the Supreme Court of the Distret of Columbia.

At Law. No. 45662.

HENRY MAURICE TALBOTT, Plaintiff,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER, Defendant-.

1. The plaintiff joins issue upon the joint and several first plea of the defendants Thomas H. Pickford and John H. Walter.

2. The plaintiff joins issue upon the joint and several second plea of the defendants Thomas H. Pickford and John H. Walter.

3. The plaintiff joins issue upon the joint and several third plea of the defendants Thomas H. Pickford and John H. Walter.

ANDREW A. LIPSCOMB,
Attorney for Plaintiff.

Memorandum.

March 12, 1906.—Verdict for plaintiff for Eight thousand five hundred dollars ($8,500.00).

33 Supreme Court of the District of Columbia.

FRIDAY, *March* 30, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

At Law. No. 45662.

HENRY MAURICE TALBOTT, Pl'tf,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER, Def't.

Upon hearing the defendants' motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered:

Therefore it is considered that the plaintiff recovered against the defendants the sum of Eight thousand five hundred dollars ($8,500.) with interest thereon from this date being the money payable by them to the plaintiff by reason of the premises, together with his costs of suit to be taxed by the Clerk and have execution thereof;

The defendants note an appeal to the Court of Appeals, and the penalty of the bond to operate as a supersedeas is fixed in the sum of Twelve thousand dollars ($12,000.)

It is hereby ordered that the January Term 1906 of the Supreme Court of the District of Columbia be, and the same is hereby prolonged for the period of thirty-eight days, exclusive of Sun-
34 days, for the purpose of settling the bill of exceptions in the above entitled cause.

Memoranda.

April 12, 1906.—Appeal bonds (2) filed.
May 9, 1906.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

TUESDAY, *May* 15, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

At Law. No. 45662.

HENRY MAURICE TALBOTT, Pl'f't,
vs.
THOMAS H. PICKFORD ET AL., Def'ts.

Now comes the defendants by their Attorneys and pray the Court to sign, seal and make part of the record their bill of exceptions taken during the trial of this cause (and heretofore submitted) now for then, which is accordingly done.

35 *Bill of Exceptions.*

Filed May 15, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 45662.

H. MAURICE TALBOTT
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

Please take notice that on Wednesday the 9th day of May, A. D. 1906, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, we shall ask the Court to settle the bill of exceptions in the above entitled case. A copy of the proposed bill of exceptions accompanies this notice.

H. E. DAVIS,
SAM MADDOX,
Attorneys for Defendants.

Service of foregoing notice acknowledged and copy of proposed bill of exceptions received this 26th day of April, A. D. 1906.

A. A. LIPSCOMB &
W. M. ELLISON,
Attorney- for Plaintiff.

36 Be it remembered that at the trial of this cause the plaintiff, to maintain the issues upon his part joined, offered and gave the following testimony of William J. Elliott, who testified on direct examination as follows:

In the year 1901 I was publishing the Sunday Globe in the City of Washington. The paper shown me is a copy of the paper issued on the day of its date. The article entitled "The History of a Crime" appeared in the paper of that date. Under what exact circumstances it was published my memory is not quite clear; but my impression is that Judge Mackey came to see me about Mr. Pickford and Mr. Walter, and made some statements preliminary to the visit of Mr. Pickford. I distinctly remember that Mr. Pickford and Mr. Walter came to the office and stated their case. I told them it was rather a stale case for a live paper to publish then. It had been some months since the thing was disposed of. (2). Judge Mackey stated that they were men who stood high in the community, and that the article would create an excitement. The Judge and I were then great friends. I objected that the matter of it was libelous. Judge Mackey said it was true, and I was willing to publish anything that was true, for the public good, and take the consequences myself. Mr. Pickford and Mr. Walter, I think, guaranteed me then that if anything should happen they would see me through. I then told them that the article was not of sufficient news interest to publish, and I would have to make a charge for it, which they agreed to pay. I do not remember now whether it was $50 or $100. They will recollect better, as they paid the money. The understanding, I believe, was that they were to take so many papers to Rockville, and I
37 furnished them the boy to distribute the papers. My impression is that I furnished 500 copies, and Mr. Pickford gave me $2 for the boy (3).

At that time my paper did not have any circulation in Rockville beyond a few mail subscribers. We had a large circulation in Washington. I received instructions for the boy from Mr. Pickford and repeated them. Those were to sell all he could and distribute the rest. My impression is that this was at the suggestion of Mr. Pickford, although I am not certain about it.

Pickford and Walter were at my place five or six times, at one time together. Judge Mackey was with them once (4). Judge Mackey brought me the manuscript of this article, blocked out in the rough, with a synopsis of the facts in it or an epitome of the case. I have looked for this manuscript and cannot find it.

Mr. Pickford paid me $50 or $100 in cash in my office. Walter was present (5).

Thereupon the witness further testified on cross-examination, in response to questions propounded by counsel for the defendants, as follows:

I have known Judge Mackey for five or six years and have had business relations with him. It may be that Judge Mackey brought the first article to me. I do not remember that it was headed "Oppression under the Form of Law;" but do remember that it was signed by Judge Mackey. I did not publish it as Judge Mackey had written it (6). I may have told him that it was too technical—too dry. I remember telling him that I would re-write it or elaborate it.
After the article appeared I do not remember Judge Mackey's
38 calling and telling me that he did not recognize it. It may be that on this call I told Judge Mackey that I had put into the

article a lot of hot stuff so as to make it readable, and call the attention of the readers of the paper to it.

I printed another article the following Sunday (7). I am not quite clear where I got the second article. The material was furnished by Mr. Pickford.

Thereupon the said witness further testified as follows, respecting another article than that in suit:

"Q. Mr. Elliott, was not this article brought to you by Mr. Bradshaw? A. Mr. Bradshaw?

"Q. Yes; written on yellow paper? A. Yes, sir; I remember Mr. Bradshaw."

This was a second article, not the one in suit.

I did not say I put hot stuff in the first article. I said it was possible that I re-modeled the Judge's article, because of its technical character. He furnished the epitome written, and then his talk added to the epitome and I reproduced his talk, and from that made the original article. The article was prepared during the week previous to the publication (8).

Judge Mackey first came by himself and subsequently with Pickford and Walter, when we had a general conversation. I do not remember at what time in the week they called. It was the first article or the second article, or may-be both for all I know, that it was agreed should be sent to Rockville by the boy for
39 distribution. The boy would know better than I. The circumstances are indistinct to me (9).

I did not print the second article as it was handed to me but changed it very much (10). I do not remember that it was written on yellow *manuscript* and that pasted on it was a clipping from the Washington Law Reporter with regard to the Grayson case (11). I do not remember that Pickford and Walter came to my office between December 8th and December 15th, and told me that if the article of December 15th was printed they would take a thousand copies and pay five cents apiece for them. I know they were there and paid for the article. I do not know which article it was; but my impression is they had both articles. I could not be positive about it. I got $100 from Pickford; but do not know whether it was for one or both.

Talbott came to see me in regard to the articles in the paper but which one I don't know. I rather think it was about the first article (12). I told him I was responsible for everything that was in my paper. I thought he was becoming hostile, and that was to cover my informants, who, I told him, were thoroughly responsible. Mr. Talbott may have bought a couple of papers. (13), possibly a dozen or more. They were for sale. After the publication of the first article Judge Mackey came and told me he was Hudson's attorney, and therefore I mentioned that fact in the second article (14).

I do not remember that the attempted trial at Rockville occurred on the 27th of November, 1901. It was too stale for my paper, having been in the daily papers. I publish nothing but original news (15), and never revive or rehash anything. Pickford
40 and Walter told me they were responsible for the libel; but did not give me any written guarantee. I took it on their

standing and reputation and Judge Mackey's recommendation (16). I am really uncertain whether Pickford gave me $2 for the boy for the first or the second article. I got money from Pickford twice, on both articles, or I would not have put them in. I do not remember that I sent a proof of the second article to Pickford (18), although I should have done so if he had asked for it. It is possibly true that he offered to go on my bond if I should publish the second article and was arrested for libel. I do not remember whether Talbott bought papers containing the first or the second article. I wrote the head lines (19).

On cross-examination by Mr. Maddox, the following further took place:

"Q. Mr. Elliott, why did you publish this article if you knew it was libelous? A. Because Mr. Pickford and Mr. Walter said they would be responsible for the libel.

"Q. Did they give you any written guarantee? A. Not at all, I took it on their mercantile standing, on their reputation and Judge Mackey's recommendation.

"Q. When did Mr. Pickford give you this two dollars to pay to the boy? A. He gave it to me in his office.

"Q. At the time of the first or second article? A. I am really uncertain about that. I cannot tell you. I got money from Mr. Pickford twice, on both articles. Whether I got cash for the
41 first and he bought papers for the second, or whether I got cash for the second and he bought papers for the first, I am uncertain; but I was paid for both articles, or I would not have put them in.

"Q. You were paid for both articles? A. Either by buying the papers or paying cash.

"Q. You were paid or you would not have put them in? A. No sir. They were not sufficient interest to my readers.

A copy of the Globe of December 8th, 1901, containing the alleged libelous article as set up in the declaration, was here offered in evidence.

Thereupon the plaintiff further gave evidence by one GROVER WERNEKE who testified on direct examination as follows:

I used to be in the business of selling newspapers and amongst them the Globe. I remember once of going to Rockville with some of those papers, two or three hundred. Mr. Elliott paid me $2 for going. I do not remember Mr. Pickford (21), and never went to his place of business.

I went to Rockville and started to "holler" about the big story of Mr. Talbott and some one told me it was not allowed, and of course I gave the papers away to two or three boys. I only gave away a very few because I was stopped (22). I went to Rockville once a week day, on Monday or Tuesday, right after the edition was out (23).

On cross-examination the witness testified, in response to questions propounded by counsel for the defendants as follows:

42 I do not remember whether I took to Rockville the paper of December 8th or the paper of December 15th. I did not

go the day the paper was published. I never saw Mr. Pickford or Mr. Walter (24).

Thereupon the plaintiff further gave evidence in his own behalf and, in response to questions propounded by his counsel, on direct examination testified as follows:

I reside in Rockville and have lived there since 1882. I am a member of the bar of the State of Maryland and of this District. I held the office of State's Attorney at Rockville for four years and was the incumbent of that position at the time of the publication of this article in 1901 (25). At that time I did not know Mr. Pickford personally or Mr. Bradshaw, although I did know Mr. Walter in a casual way.

The first time I became aware of the circulation of the Globe containing the article charged in the declaration was, I think, on Sunday, possibly at 4 o'clock in the afternoon. The papers were circulated all around the town, from one end to the other. One of them was left on my porch (26). I do not know whether it was the first or the second article but I think it was the first (27).

On cross-examination the witness testified, in response to questions propounded by counsel for the defendant Pickford, as follows:

I was elected State's Attorney in 1899. Broadly stated, a State's Attorney in Maryland acts as what you might call a chief of police and advising officer to the sheriff. He investigates serious
43 crimes (28). I investigated the crime for which Pickford and Walter were indicted in our county, before presenting it to the grand jury (29). It was first brought to my attention by an old gentleman here in Washington named Thompson, in a vague and indefinite letter, and Thompson stated in it that he would like to confer with me on the subject. I did not go at once to see Thompson; but shortly afterwards received another letter in which he stated the crime was one of arson. I do not know where those letters are nor do I know whether or not the matter had been brought to the attention of my predecessor in office. It occurred during his incumbency. I did not inquire about it from my predecessor, Mr. Kilgour (30). I do not know whether or not I asked Thompson if the matter had been brought to the attention of Mr. Kilgour (31). The fire occurred in September, 1897, two years and four months before I qualified.

Thompson was a newspaper man. I had never seen him before calling in response to his letter (32). He told me that Hudson would be a witness, but did not tell me who Hudson was; but that he was thoroughly in touch with the situation. Subsequently Thompson and I went to see Hudson. I took a stenographer with me (33). They were both strangers to me.

Thereupon the Court, of its own motion, interrupted the cross-examination and the following occurred:

The COURT: On what line are you pursuing this inquiry?

Mr. MADDOX: I am going to show, if I can, the absence of good faith in this indictment on the part of the District Attorney.

44 Thereupon, after discussion and explanation on the part of counsel for the defendants, the following occurred:

The COURT: I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth about pleading it. * * * You may prove anything Pickford heard the witness say, before the article was published.

Mr. MADDOX: I want to prove by this witness first by his own testimony in connection with the transaction complained of in this article that he is not a man of good character which he says he is.

Mr. LIPSCOMB: I do not object *by our* asking him, that, Mr. Maddox.

Secondly, I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy.

"The COURT: You may prove anything Pickford heard the witness say before the article was published.

Mr. MADDOX: I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury and whether he investigated the character of the man.

"Under your statement that you propose by that line of testimony to prove that the District Attorney acted in bad faith, I will not hear it, because I do not think it is relevant for that purpose.

45 To which ruling of the Court the defendants, by their counsel, then and there duly excepted and prayed the Court to note the same upon the minutes, which was accordingly done.

And thereupon, after the foregoing proceedings which is hereby made a part hereof, the witness proceeded further to testify on cross-examination as follows:

I was present in the Police Court at the trial of Hudson and Hopp for Conspiracy. Mr. Pickford was there (29). I had known Hudson possibly three or four months before that hearing. The conversation between him and Thompson and myself occurred in the fall of 1900. It developed in the police court (40) that I had sent a check for $75 with which to take up a chattel mortgage that Hudson had on his printing plant. He put up a pitiful plea to me to help him. This was considerably before the indictment (41). I also testified that I had given him $25, but it was really $15, which was charged up against the county (42). The $75 was not so charged. I testified in the Police Court that the $15 was given to him for services in working the case up. (43).

Mr. Pickford was present at Rockville on the day set for the trial of the indictment against him (44). I do not remember that Hudson was there; but he may have been. I do not remember stating after the case was called, that I wanted to go down to the Sandy Spring neighborhood and make inquiries about it: but I rather think I asked for a further extension of time until I might go down there (45). I do not remember that Judge Henderson announced from the bench that he would grant the extension provided that if I was

not ready to go to trial on Monday morning a plea of not guilty
46 should be confessed by the State. (46). It is possible that the Judge did so state. Judge Motter, sitting with Judge Henderson, announced from the bench the following:

"Ordinarily persons charged with crimes do not particularly seek for trial. Here we have a man who could not be compelled to answer at the bar for the crime with which he is charged, who voluntarily comes forward and asks for a trial. For that purpose he is now in Court with his witnesses. The indictment of an innocent person is a serious matter to keep hanging over his head" (47).

I remember that there was a trial in Justice Strider's Court in April, 1901, of a case brought by Pickford against Hopp and Mann, right over at the corner. I was passing and stopped for a few minutes where the people on the inside could see me (48). I don't remember calling Hudson out; but I do recollect having had a talk with him (49). I will not say that I did not call him out two or three times. I don't recollect seeing Mr. Lipscomb in the court room (50).

I was one of the parties defendant to the suit of David C. Grayson and others trustees against Frank I. Wood *et al.*, decided in the Court of Appeals in the District of Columbia.

The boy with the newspapers came out, I think, on the 8th of December. I did not see him there the second time. I saw the second article.

"Q. You found nothing libelous in the second article; did you? (52). A. I thought we had suits on both. Yes; both were
47 libelous."

I cannot fix definitely which paper it was the boy brought out to Rockville, whether it was the one of December 8th or that of December 15th.

And thereupon the witness further testified on cross-examination, in response to questions propounded by Mr. Davis, counsel for the defendant Walter, as follows:

I testified at the trial in the Police Court that Mr. Kilgour was my predecessor in office at Rockville, and that the fire took place in the middle of September, 1897 (53). The trial in the Police Court took place in the year 1901. I came down to hear the trial. (54). It may have happened in that trial that an inquiry was propounded as to how it happened I took up that case after Mr. Kilgour had gone out of office (55).

And thereupon a recess was taken. When the Court reconvened at the expiration of the recess, the witness William J. Elliott was recalled and further testified on redirect examination, in response to questions propounded by counsel for the plaintiff, as follows:

"My recollection is that the papers were wrapped up in the Globe office and several hundred copies were sent to Mr. Pickford's establishment. Pickford suggested that I, having mail facilities, put them in my own mail edition and send them out." I think a list of names was given to me to whom they should be sent (63), either by Mr. Pickford or Mr. Walter, or their agent Mr. Bradshaw.

Some three or four hundred were mailed. I sent the proof of the article that Judge Mackey brought and that I remodeled to
48 Mr. Pickford; but do not remember by whom it was sent. I think I took it myself.

On cross-examination the witness further testified, in response to questions propounded by Mr. Davis, counsel for the defendant Walter, as follows:

"Q. Mr. Elliott, when you were on the stand before recess you testified that you did not remember which of these two articles the proof of was sent to Mr. Pickford. What has refreshed your recollection in that particular? A. I went over the whole thing retrospectively (64) and remembered that the first article by Judge Mackey that he brought to the office was not such an article as I would want to publish. There were several objections that I made to it. I so told Mr. Pickford that I would remodel it and give him the proof" (65).

Mr. Walter was present when Mr. Pickford paid me the money and handed out a part of it. Walter gave Pickford some twenty dollar bills to pay me, (66). My recollection is that the papers bundled up in my office were the issues containing both articles (67).

Counsel for the plaintiff thereupon announced his testimony closed.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the defendants, to maintain the issues on their part joined, and offered and gave evidence by THOMAS J MACKEY, who testified on direct examination, in response to questions propounded by Mr. Maddox, counsel for the defendant Pickford, as follows:

49 I am a member of the bar (70) and have been for forty years. I met Mr. Pickford in 1901, about the time of this Rockville indictment. In the summer or early fall of that year I was employed by him in connection with the indictment against him for arson in Montgomery County. I attended court with him on the day appointed for the trial (71). I Had given it as my opinion that the owners of the burned buildings were no more indictable for burning them than they would have been for burning their hats, and stated to Mr. Pickford the grounds upon which I could have the indictment quashed. After some very severe comments by the court on Mr. Talbott, he entered a *nolle pros.* in the case.

After returning to Washington I prepared an article in regard to the matter of this indictment, without consulting either Walter or Pickford. They did not request me to write it. When the article was partly written I read it over to Pickford and Walter at my office. Pickford asked if it would subject him to a suit for libel and I answered that it would not, that it was my article. Pickford never saw the conclusion of the article (73). I took it to Mr. Bone, the editor of the Post at night, and he said there would be a charge for it. I then took it to the Globe because I had close personal relations with Mr. Elliott. We were strongly attached to each other. The article was headed "Oppression under the Form of Law." It was never

published as I wrote it. The head lines were not mine and four or five of the paragraphs were not mine. I had not put in the paragraph relating to the telephone message about Hudson being in jail (75). There was nothing libelous in the article I wrote.
50 The concluding paragraph of it is not mine—not a line of it. The article I wrote imputed no criminality to Mr. Talbott.

On cross-examination the witness, in response to questions propounded by counsel for the plaintiff, testified as follows:

I was Hopp's attorney in the conspiracy case in the Police Court. You (referring to Mr. Lipscomb) were attorney for Hudson. (76.) I was not friendly with Mr. Pickford then, but in the fall of 1901 he offered me a retainer to have the indictment at Rockville quashed. When that case was *nolle prossed* my employment ceased. He had nothing to do (77) with the article I wrote, which was in the public interest.

When this suit was brought he tendered me a retainer. (78). But when I ascertained that Mr. Maddox wanted me as a witness I declined the retainer. Hopp had failed to pay me a fee, and I ceased to be his attorney. After the article was partly written I met Mr. Pickford on the street, and told him I would like to read the article to Walter and himself (80). They had no say in the matter at all (81) and never saw the finished article. I took it to Mr. Bone of The Post, who declined to publish it without pay (82). After I left the article at the Globe office I told Pickford about it (83). I did not introduce him or Walter to Elliott and never met either at Elliott's office. Elliott charged nothing for publishing it (84). Everything that imputes criminality to Mr. Talbott is not mine (85). The clause beginning "The Insurance Company's death grip on the District Attorney to secure the return of the money
51 justly paid out is as evident as the treacherous character of the testimony he relied upon to destroy the reputation of honorable men and blast forever their characters, which in this community stand unimpeached and are unimpeachable by even a Maryland District Attorney." None of that is mine. The plan of my article was to show that there was a conspiracy in this city, and that Mr. Talbott was victimized (87). I complained to the editor because he had changed my article. He said he wanted to put some hot stuff in it. I knew he needed sensations in his business, and that he had even endeavored to get prosecuting officers to prosecute him for libel (88). I knew him as a champion of the public interest. He wrote the article because he believed every word of it to be true (89). I had frequently written for the paper.

I knew nothing of any payments of money by Pickford or Walter to Elliott.

And thereupon the defendants further gave evidence by one AARON BRADSHAW, who testified on direct examination as follows:

I am inspector of personal property under the District Government and was one of the men indicted for burning the house up in Montgomery County (92).

I saw the Globe of December 8th, 1901, on the morning of its issue. My son is a newsboy and brought it in to me. (95). It was not satisfactory to my way of thinking. It did not state the facts from my standpoint, (97), and I wrote another (98) taking it to the Globe. My purpose in writing the second article was to bring
52 out the testimony in the Police Court, and the decision of the Court of Appeals in the Talbott and Wood case. This was published in the Globe of December 15th, and I distributed it very generally.

I know Mr. Kilgour, the predecessor of Mr. Talbott. I met him one day in front of the Gunton Building, (100). He told me that Mr. Hudson and Mr. Lipscomb had presented the arson case to him two or three years before and that the insurance companies were going to pay $11,000 to secure the indictment and conviction of Mr. Pickford, Mr. Walter and myself; that Kilgour had replied that he was not engaged in any blackmailing game. I told Mr. Pickford of this interview.

On cross examination the witness further testified as follows:

Mr. Kilgour told me this while matters were pending here. (102). Neither Mr. Pickford nor Mr. Walter knew anything of the article I wrote. Elliott did not charge me anything (106). I was not very friendly with Pickford at the time. I was not employed by him shortly before the house was burned, though shortly afterwards (107) I bought 15 acres of ground and paid for it, $500 cash and $1000 borrowed from Mr. Talbott (108). The article was not printed as I wrote it. Elliott put in a great many things that were not in my article. My purpose was to call their attention to the decision of the Court of Appeals of the District of Columbia giving Mr. Talbott's transaction in that case, and also the decision in the Court of appeals in Maryland, that was almost equally severe on him (110). I cut a clipping out of the Law Reporter giving the
53 decision of the Court of Appeals referred to.

Thereupon the defendants offered in evidence the record and proceedings in this Court in the case of The United States *vs.* James Hudson and Ferdinand Hopp indicted for conspiracy, which record also shows that they were held for the grand jury after hearing on charges for the same offense, in connection with the hearing in the Police Court.

And thereupon the defendants further gave evidence by one THOMAS H. PICKFORD, who testified on direct examination in response to questions propounded by Mr. MADDOX, as follows:

I am one of the defendants in the case. Prior to the year 1900 I was engaged in the wholesale and retail grocery business and also in the buying and selling and improvement of real estate. My grocery business was at 9th Street and Louisiana Avenue. I had a large trade through Montgomery County and Prince George's County and also in Virginia. I have since given up the grocery business and am now operating in real estate. In 1897 Mr. Walter and I owned a house in Montgomery County, Maryland, which was burned. About that

time Hopp was a customer of mine, and one day came to my office and said that I was going to have trouble about the fire (119), which he could arrange for $500. I told him that it was all bosh. This was in the fall of 1900. In January of 1901 he came to me and said that Talbott and Hudson were going to prosecute me for burning the house, explaining that Talobtt was prosecutor in Montgomery County (121). Two weeks later he came to my
54 place, called me aside, and showed me a check of Talbott's for $75, intended for Hudson, as part pay for his testimony. The indictment followed (121). I did not resist arrest, but went to Rockville next day and gave bail. In November (122) on the day set for trial, I went to Rockville with my witnesses. Mr. Talbott was not ready to go to trial and wanted an extension (123). The Court said he would grant the extension provided that if the State was not ready on the day set it would confess that I was not guilty. This Mr. Talbott declined to do, and *nolle prossed* the case. Shortly afterwards Judge Mackey suggested that he would write an article about it (124), and asked me to come to his office with Mr. Walter and hear what he had written, which we did. I never saw it until it was published in the Globe of December 8th. With this I had nothing whatever to do and did not hire the boy to go to Rockville. What I wanted was an article stating the proceedings in the Police Court and Talbott's testimony there, that he had never given either Hopp or Hudson a dollar, but subsequently when confronted with the fact confessed that he did give them a check and some money besides. Then I wanted the Grayson matter in the paper and also a case that happened in Maryland (125). I had also heard of a Maryland case in the Courts and got some one to look it up, and another case in Maryland where some man was arrested for murder, and it was supposed that he paid Talbott money to be released. Up to December 8th I had never seen Elliott. Between that date and the 15th Bradshaw wrote an article which I did not see until
55 Elliott sent for me. I went down with Mr. Walter, approved of the article, and agreed to take a thousand copies and to pay 5 cents apiece for them (127). This is the only money I ever paid Elliott.

I took a lot of the copies of the paper of December 15th to my store and gave them to my Maryland customers when they came in. I did not send them out any by mail. After my interview with Mr. Elliott I never saw him from that day to this, until he appeared in Court. I did not request him to appear as a witness in my behalf in this trial (127).

Prior to December 8th Mr. Kilgour came to my former place of business (129), after the indictment, and stated that he knew all about the case and sympathized with me in the trouble. He said the whole thing had been brought to him; that it was a blackmailing scheme, and he ordered the people out; that it depended upon the testimony of a man named Hudson, who never knew me (130).

I know James L. Pugh, one of the District Attorneys in the Police Court. I employed him during the summer of 1901 to investigate the case in Rockville. He returned and said to me: "There

is not a particle of evidence about you. The whole thing is a put up job to get your money" (131). He said Mr. Kilgour told him that.

Shortly after the indictment Hopp came to my place of business and said: "For $500 I could have saved you all of this trouble. Now it will cost you ten or fifteen thousand dollars." Suspecting blackmail I went at once to the District Attorney who referred me to the chief of detectives, who detailed two men to hear what Hopp had to say. They were concealed in my office (132).

Hopp came, and said that they wanted eleven or twelve thou-
56 sand dollars, of which amount he was to get fifteen hundred and the balance was to be divided between Talbott and Hudson; that the case would then be *nolle prossed*. I told Hopp I did not have the money, but would return a note of his for $250 endorsed by a man named Mann, and I also gave him $200 in marked bills. He then went away from my office, the detectives following him, and subsequently they arrested him at the Century Cafe on Pennsylvania Avenue. They also arrested Hudson. (To Mr. Maddox:) I employed other attorneys because you were sick in April, 1901, and went away for the summer, shortly after getting out (134).

At the trial in the Police Court Mr. Talbott testified as a witness. He at first positively denied (135) that he had ever given Hudson either money or checks, but subsequently admitted it and explained that he had given Hudson money for buggies and other expenses. After the hearing at the Police Court Hopp and Hudson were held for the grand jury (136).

A few days later a reporter of the Post came to my office. He said he had just seen Hudson in jail, who admitted that he had been pulled into a scheme, and that there were people who would pay money to keep me in the case at Rockville (137).

Shortly after the Police Court trial I sued Hopp and on the note before Justice Bundy. Hudson was present as a witness at the trial represented by Mr. Lipscomb. Talbott also came to the door, opened it and called Hudson out four different times. He talked to
him on the street, and everybody remarked how excited Tal-
57 bott was about it (138).

Counsel for the defendant Pickford here offered in evidence a certified copy of the Rockville indictment to show that it was found on the 26th day of March, 1901, upon the evidence of James Hudson; that on the 29th day of March Pickford appeared and gave bail, and that he appeared in court for trial on the 27th day of November, 1901, on which day a *nolle pros* was entered in open court by H. Maurice Talbott, the then State's attorney (139).

I was present in Judge Bradley's Court during the hearing on *Habeas Corpus* from the beginning to the end, and heard the Judge's decision discharging the prisoners.

On cross-examination the witness further testified as follows:

I bought the property in Montgomery County in April, 1897 (142.) In September we employed some people to finish the building, which had not been completed by the former owner (143).

At that time I was engaged in the wholesale and retail grocery business and also extensively engaged in real estate operations. I own houses in Maryland and Virginia, and three hotels in Virginia, also a good deal of property in Washington (144).

I first heard of the fire in Montgomery County by reading the newspapers the following day. I never heard that it was being investigated by the County authorities until the indictment was found in 1901 (145). Hopp had told me about it in the fall of 1900, but I did not believe him (146).

Judge Mackey represented Mr. Hopp in the Police Court.
58 It was some months after that that I retained him to go to Rockville. I had not employed Mr. Maddox in the case at that time. He was sick in bed, and he afterwards went away. I did not employ Mr. Peter of Rockville. Mr. Maddox did, as an associate out there (149). Mr. Gatley appeared in court as an office associate of Mr. Maddox. Judge Mackey wrote the article shortly afterwards, without any request from me. He told me he made as much money writing articles for magazines as he did as an attorney, and was going to write up this case in the interests of justice. I did not pay him a cent for it. He read a part of it to me, but not as it appeared in the Globe (152). I could not recognize the article in the paper of December 8th as Judge Mackey's. All that I remember of it is that it contained the Police Court proceedings (154). He told me he would have it published in the Post, but said nothing whatever about the Globe until afterwards. I was never at Mr. Elliott's office but once, and then after the publication of December 8th (155). My object in publishing the article of December 15th was to get before the people of Montgomery County and my customers something that would show all the proceedings that happened in Court, and that we could substantiate in every particular. I wanted all those things brought before the public (156).

After it was published Bradshaw met me and said "That is not right at all" and went off. I never saw his article until I saw it in Elliott's office (157). I did not see the proof of the article. Elliott read it over to me and told me he would make some changes to make it more readable. He is mistaken in saying that
59 I paid anything for the first article, for I did not. Judge Mackey's article as he read it to me consisted of court proceedings, and was backed up by evidence (162). When Mr. Talbott first took the stand he swore he did not give this witness a check, but after the check was proved he admitted that he did give it and money also, and Mr. Talbott went on to make out that he gave the money out of kindness to the old man, but I knew there was nobody in Montgomery County that would believe that statement, and that would set me right (164). We investigated the rumor that Mr. Talbott had released a man accused of murder for money (165), while we were having Mr. Talbott looked up after the court proceedings (166). I do not remember the name of the murder case (167).

I did not go with the detectives when they left my office after the Hopp interview, and was not present when Hopp and Hudson were arrested (169).

On further cross-examination, the following occurred:

By Mr. MITCHELL:

Q. Mr. Pickford, you have stated that you had gone into Maryland and found out that Mr. Talbott had released a man who was accused of murder—*nolle prossed* his case for money. A. I did not say that.

Q. What did you say in regard to that? A. I say I heard something in reference to that, and I sent out to have it investigated, and that there was a part of that in the paper.

Q. Who told you that? You say you heard it? A. That was common talk out in the town.

60 Q. Common talk among whom? A. Mr. Bradshaw told me for one.

Q. Who else? A. I don't know who else. I cannot recall the name.

Q. Then it could not have been such common talk? A. Yes, it was.

Q. Can you name any other citizen of Washington, or of Montgomery County, who told you that Mr. Maurice Talbott had *nolle prossed* a case for money, of a man charged with murder in Maryland? A. I say we investigated that, and part of the case.

Q. Answer the question please.

Mr. MADDOX: Let us see. He says he investigated it.

By Mr. MITCHELL:

Q. I do not care about that. Can you name a single individual in the city of Washington, or in Montgomery County, who told you, besides Mr. Bradshaw, that Mr. Talbott had *nolle prossed* a case of a man charged with murder, for money? A. I do not know of any, no. That was a part of it that we looked up.

Q. Who do you mean by "we"? A. I do not mean anybody but me. I mean myself.

And thereupon the defendants further gave evidence by JOHN H. WALTER, who on direct examination testified in response to questions propounded by Mr. Davis substantially as follows:

61 I have lived in Washington for twenty years and am a real estate broker. I was indicted in 1901 for burning a house in 1897 (170). I was present in Judge Bradley's court and took part in the *habeas corpus* proceedings. I heard the Judge's decision.

About the 1st of December, 1901, Pickford told me that Judge Mackey (171) was going to write an article on the Rockville case and asked me to go with him to Judge Mackey's office to hear what he had written. The Judge read something which he said he was going to publish in the papers. This is about all I know of the article.

Subsequently Bradshaw informed me he was going to write an article. I knew he was accustomed to writing articles for the daily papers, and especially articles on local politics and Mr. Pickford one day asked me to go with him to the office of the Globe, the editor having asked that we appear there, and wanting to read some article

to us. He read the article over, and we agreed that if it was printed in his paper we would take a thousand copies and pay five cents apiece for them. The article seemed to be pretty good (172) and to embody the facts. We paid for the papers and quite a number of them were distributed. Five or six hundred of our thousand copies were never distributed.

I had nothing whatever to do with the article of December 8th.

On cross examination the witness testified as follows:

We paid about $33,000 for the house which was burned, $3500 in cash and the balance in Washington property which had cost us a lot of money (173). The house was insured for $27,000
62 (174), in four or five companies (175). Bradshaw was never employed when that house was being repaired. I asked him to go there two weeks before the fire occurred to see if the former owners had moved their furniture out (176). I never went to Mr. Elliott's office but once (177).

And thereupon Mr. Davis offered in evidence the opinion of Mr. Justice Bradley delivered in the *habeas corpus* proceedings as published in the Washington Law Reporter dated the 29th day of April, 1901.

And thereupon the defendants rested, and the foregoing was all the testimony given in behalf of the defendants.

And thereupon the plaintiff offered evidence in rebuttal by one JAMES HUDSON, who testified on direct examination as follows:

I never was in Mr. Kilgour's office and never was ordered out of his presence (179). I never saw him but once (181). I was a witness before the grand jury in Montgomery County, and the only witness, when the indictment was found for arson in burning the house at Four Corners (182).

And thereupon the plaintiff further gave evidence in rebuttal by one ALEXANDER KILGOUR who testified on direct examination as follows:

I am a member of the bar of Maryland (183), and the immediate predecessor of Mr. Talbott as State's Attorney for Montgomery County. I do not remember seeing Mr. Bradshaw on Louisiana Avenue in 1901, though possibly I did (184). I cannot recall
63 a conversation with him in which I said "This whole scheme is a case of blackmail, and I ordered that fellow Hudson and Andrew Lipscomb out of my presence when Lipscomb told me that there was $11,000 to be divided between Talbott and Hudson." I talked with him about the alleged offense, but do not recall ever having said it was a blackmailing scheme. I never talked with Hudson about it. The only talk I ever had with Mr. Lipscomb was in his office about the time of the fire. I may have criticised what I knew of it personally and officially (185). I had a very decided opinion about it at the time, and I have no doubt that I expressed my opinion to Mr. Pickford and Mr. Bradshaw.

On cross examination in response to questions propounded by Mr. Maddox, the witness testified as follows:

My term of office as State's Attorney expired in January, 1900. I called at Mr. Pickford's office subsequent to the indictment you mention. He had requested me to defend Mr. Shaw, who was one of the parties indicted (191). When this house was burned the matter was called to my attention by the officials (192). I cannot recall that I used the word "blackmailing" in my conversation with Mr. Pickford, but in all probability I did so, and that it was an effort on the part of the insurance companies to use my office for the purpose of collecting their money (193). My conversation with Mr. Lipscomb on this subject was at his office in response to a telegram from him to see him in reference to the matter. I told Mr.
64 Bradshaw of the interview and what the testimony was; that is, that I went to Mr. Lipscomb and he stated that he had evidence of the crime; that the witness he could produce was one of the accomplices, and he asked me if I could guarantee immunity to the man if he testified (194); that Mr. Lipscomb also told me that the insurance companies had $23,000 invested in it, and that the people who were supposed to have burned the property were the owners of it; that I told him I thought a man had a right to burn his own house, and that the testimony of an accomplice could not convict without corroboration. I understood Mr. Lipscomb to say that the insurance companies would spend $23,000 to convict these people, but nothing was said of the disposition of the $23,000 (195) The conversation with Mr. Lipscomb lasted five or ten minutes.

Thereupon the plaintiff further gave evidence by one FERDINAND HOPP, who testified on direct examination as follows:

I have been a resident of Washington for eight or nine years, and was running the Century Café on Pennsylvania Avenue near Sixth Street in 1901 (186). Mr. Hudson had done all of my printing. At that time I bought groceries exclusively from Mr. Pickford, who loaned me money to buy the café. It was three blocks from his place of business (187). I did not tell Mr. Pickford that I could settle the case for $500, nor that I could get $11,000 from the insurance company. I did tell him that Hudson had a letter which he was going to send to the State's Attorney, and therefore it was I had come to see him. I made an appointment for him to meet
65 Hudson at my place of business. Pickford came but Hudson did not. He went away, saying there was nothing in it. This was in November, 1900. In April, 1901, Pickford sent me a note by a boy to come to his store (189). I went. He asked me if I had heard of his trouble over the indictment, but I told him no(190). He then said: "I am in trouble." He said: "Your friend Hudson is the main witness in this case. Go and talk to him and tell him to hold up"; that he would give him $500 to get out of the country for three months. Hudson would not listen to it. Pickford then told me to offer him $1,000; that if they could not get Hudson at Rockville they would throw up the case (197), and he could get back the $3,000 he had left in Rockville for security. Hudson would

not listen to it. Next day Pickford sent for me again and gave me $200 and a note, and I did not want to take it (198). He told me to offer it to Hudson and if he would not take it I could fetch it back. I did not know that detectives were listening to our conversation. I did not offer the $200 to Hudson, though when I got back to my café he was there sleeping in my office. I never had any talk with Pickford about the payment of the $11,000 which was to be divided between Talbott and Hudson (199). When I was arrested I sent for Mr. Pickford to go on my bond, but he would not do it. I have never been convicted of any crime, and there is no indictment against me now (201).

On cross examination the witness testified in response to questions propounded by Mr. Davis, as follows:

The day I was arrested Mr. Pickford gave me $200 in cash. I then went from his place to the 20th Century Café (202). I
66 was then arrested by two detectives. Thereafter Hudson and I had hearings in the Police Court on the charge of conspiracy, part of the evidence being in respect to my receipt of $200 (203). The so-called "second article" was not produced and was not offered in evidence.

And thereupon the plaintiff rested; and the foregoing is all the testimony that was given at the trial by any of the parties.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the Court, at the instance and request of the plaintiff, gave the following instructions; and each of them.

2. The jury are instructed that if they believe from the evidence that the defendants circulated or distributed, or caused to be circulated or distributed, the papers containing the libelous article or libelous matter in Montgomery County Maryland, in greater numbers than the ordinary circulation thereof in said State and County, knowing the contents thereof to be libelous and untrue with intent to injure the plaintiff in his good name and profession or cause him to fall in disrepute among his neighbors thereby, they shall find for the plaintiff regardless of who was the author of said article.

3. The jury are instructed that if they believe from the evidence that the defendants or either of them, procured the said article in the Globe to be published, or circulated the same after its pub-
67 lication, maliciously, recklessly, wilfully and wantonly, that is, that they or either of them procured the publication or circulation of the article in the spirit of mischief or of criminal indifference to civil obligations, they may give exemplary or punitive damages in addition to other damages against the defendant so acting, or against both of them if they believe both so acted.

4. In estimating the damages sustained by the plaintiff the jury must in their sound discretion view all the circumstances of the case, the character and standing of the parties, the nature of the imputation, and the extent to which it was given publicity.

5. If the jury shall find for the plaintiff, in estimating damages they should render their verdict for such sum as the jury believe from the evidence will fully and fairly compensate the plaintiff for the injury suffered by him, in his office and profession as States At-

torney of Montgomery County, Maryland, and as a lawyer, by reason of the publication and circulation of the alleged libelous article and the tendency thereof to bring the plaintiff into disgrace and disrepute among the members of his profession and in the community in general in which he resides or where he is entitled to practice his profession.

6. To instructions numbered 2 and 5, at the time they were requested and before they were given, the defendants and each of them by their counsel severally objected, and upon the overruling of such objection, and to the giving of each of said instructions the
68 defendants, and each of them, by their counsel, severally, then and there excepted, and prayed the Court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings which are hereby made a part hereof, the defendants, by their counsel, requested the Court to give the jury the following instructions and each of them:

1. The jury is instructed that this action is based exclusively upon the article printed in the issue of the newspaper known as The Sunday Morning Globe, of December 8, 1901, and that, in order to entitle the plaintiff to recover, the jury must find that the exact language of that article, or such part thereof as the jury under the instructions of the Court shall find to be libelous and as are set forth in the declaration, was or were written, or authorized to be written, or published, or authorized to be published, by the defendants, or one of them, and its verdict in any case can be against only such one, if either, of the defendants as is shown by the evidence so to have written or published, or authorized the writing or publishing of the same. And, in considering whether the defendants, or either of them, authorized the publishing of the said article, or any such part thereof, as set forth in the declaration, it will not be sufficient to find from the evidence only that the defendants, or either of them, had knowledge, in advance of the publication of the said article, that it was
69 to be published and expected its publication; the jury must find from the evidence that the defendants or one of them, authorized, directed or participated in the publication.

2. The jury is instructed that there is no evidence in the case in support of the first count of the declaration, and that the plaintiff is not entitled to recover on that count.

3. The jury is instructed that the plaintiff is not entitled to recover in this action, because the only damage claimed by the declaration to have been suffered by the plaintiff is in respect of the incumbency of his office as State's Attorney for Montgomery County, Maryland, and there is no evidence that he was injured or suffered any damage in respect thereof.

4. The jury is instructed that even should it find for the plaintiff its verdict must be for nominal damages only.

5. If the jury find from the evidence that the defendants authorized and participated in the publication of the alleged libel, set forth in the declaration, yet further find that the defendants had reasonable ground to believe, and, in fact, believed, the matters and things herein set forth to be true, and published the same without

malice or vindictiveness against the plaintiff, and with a view only to setting themselves right in the eye of the public, the verdict must be limited to such damages as will compensate the plaintiff
70 only for such injury, if any, as the jury shall find from the evidence actually to have been occasioned the plaintiff by the publication of the said alleged libel.

6. The burden of the proof is upon the plaintiff to establish, by a preponderance of the evidence, both the fact of the publication by the defendants, or either of them, of the alleged libel and of other than nominal damages thereby occasioned the plaintiff.

And thereupon the court gave said instructions numbered 2 and 5, but refused to give the others of said instructions, numbered 1, 3, 4 and 6, or any of them; to which refusal of the Court, in each instance, the defendants by their counsel then and there severally excepted and prayed the Court to note the same upon its minutes, which was done.

And thereupon the Court, of its own motion, charged the jury as follows:

The COURT: Gentlemen of the jury, everyone has the right that the good name which he has made for himself in a community shall be preserved, and shall endure without injury. Inasmuch as reputation or good name is established by that which goes current in the community by way of report, the moment that a false report is put current in the community then the reputation of the individual concerning whom that false report is made is injured, and suffers, if the false report in of such gravity as to injure it. When false defamation is put current verbally it is called slander. When it is
71 put current in the shape of writing, printing or effigy, it is called libel. Sometimes a false report may be of a nature so heinous as that it will injure the reputation of any man concerning whom it is published, no matter what his circumstances, his situation his occupation or his profession. It may be that a false report concerning an individual is of such a nature as that it is not susceptible of injuring every man against whom it may be spoken, but is susceptible of injuring only some classes of men. So it may be that a report put current concerning a man, if it was false, would injure him in case he happened to be engaged in a particular office, or profession or employment, but would not injure him if he was not engaged in that particular regard. It may be that a report falsely made concerning a member of the legal profession would injure one of that profession in his good name, whereas the same thing spoken about a man who is not a lawyer might not hurt his good name in the estimation of the public. So, in respect of the case of an individual who happens to hold an office; so in the case of individuals who happen to be State's Attorneys; it may be that the report made concerning them would injure their reputation, while had it been made concerning a person who was not in the situation of District Attorney, it would not in the mind of the public have affected the reputation of that individual.

When we come to consider cases of libel, it may be that a written article is susceptible of more than one meaning. It may be that it

is susceptible of a meaning which would injure the reputation of the individual spoken of; and it may be that it is susceptible
72 of another meaning which would not injure his reputation. When you have that kind of a case it is a question of fact for the jury to say which of the two meanings should be attached to the article, and which was attached to it by the people who read it; but when the nature of an article is such as that it only has one meaning, and there is no room for two, it is a question of law whether or not that article is a libel. When you consider the article of the eighth of December, upon which this suit is predicated, it is not susceptible of any two meanings. It is only susceptible of one, and that is to charge against the plaintiff in his situation as District Attorney and member of the bar, such conduct as that if it was true *is* essentially injured his reputation in both of those regards. Therefore this article on the face of it, as a matter of law, is libelous, and its meaning libeled this plaintiff. The question for you to decide is whether these defendants have done it, or whether somebody else has done it. There are two theories upon which the plaintiff submits to you the proposition that the defendants have libeled him. The first is predicated upon the testimony of Mr. Elliott, who gave testimony tending to show that the defendants procured him to publish this article after they knew what was in it, about the plaintiff; that the defendants had procured him to publish this article knowing what it contained with respect to the plaintiff, Mr. Talbott. If they did, it is immaterial whether they wrote it or not. If they knew what this article was going to be in advance, as the testimony of Mr. Elliott indicates, if they procured him to publish the article
73 in so far as it referred to Talbott, then they are liable for it, although they did not write it themselves. But if, when you consider Elliott's testimony, opposed as it is by the testimony of the defendants, and perhaps other witnesses, you conclude that the fact of that matter was that these defendants, and neither of them, did in person go to Elliott's office before the publication of the article of December 8th, and that neither of them did actually procure him to publish that article before he published it, in respect of its allegations as to Talbott, then in that regard they are not responsible for the publication on that theory as submitted by the plaintiff.

Then you would have to proceed to consider whether or not after Elliott had printed the article in his paper, they secured that particular paper and gave it circulation; because the publication of an article which on its face is a libel, injures the good name of the individual libeled independent of who wrote the article. So that, inasmuch as this article is on its face a libel, if the defendants or either of them secured copies of the paper after it was published and themselves put it in circulation after it was published, then they would be responsible for it the same as if they had written it themselves. But if not, then they would not be responsible at all, for this libel, unless it be upon the other theory the plaintiff submits, which is as follows: That although they did not write the article themselves, that although the jury may find they did not go to Elliott's and get Elliott to print the article, that nevertheless they procured

Judge Mackey to write the article and that they are responsible for it on that account.

74 That depends entirely upon whether Judge Mackey wrote an article on his own account and carried it to Elliott for publication on his own account or whether he wrote an article and carried it to Elliott, as the mere conveyance, from these defendants. It is not necessary that they should have said to Judge Mackey, in express words, "You write an article, this article, and you carry this to Elliott and get him to put it in the paper for us"; but it is necessary for you to find from the evidence before you can hold them responsible for anything that Judge Mackey did, that they either directly or by implication made him their medium for the purpose of transmission to Elliott for publication of the article. If you find that they knew Judge Mackey was about to take an article to Elliott, that is not sufficient. They did not have to stop him. It is necessary, as I have said, that you draw the distinction and ascertain whether the article carried by Mackey was his own article, taken of his own volition, or whether it was an article carried to Elliott by Judge Mackey as the mere conveyance from them of their plan and their purposes as distinct from Judge Mackey's plan and purposes. If you find he was their agent in that regard, then they are responsible for what he wrote upon this subject, to the extent that they authorized him to write. If he was their agent for the purpose of writing the article, it is not necessary that they shall have said to him, in order to be responsible for his language, "Write this, that, and the other thing," in so many words. But it is necessary that they either directly or by implication authorized him to write, under such a general authority as fairly carried with it the au-

75 thority to express on their behalf what the article contains. If so, they would be responsible for what he wrote in that regard. Otherwise, not.

There, however, you have to make another inquiry, as follows: Even if you find that they did authorize Mackey to carry to Elliott for publication an article, they are not yet responsible for this article unless you find this is the article that they fairly authorized him to carry. That is to say, inasmuch as the libel of this article respecting Talbott grows out of what this article says about Talbott—not about somebody else—you will have to find before you can hold them for what Judge Mackey did that Judge Mackey was their agent for the purpose not only of writing the article, but was their agent for the purpose of writing substantially about Talbott what this article says about Talbott; because, in so far as this article mentions Talbott in a way that injures his name as a lawyer and official, if you find that those parts of this article were written by Elliott, and not by Judge Mackey, and yet you find that Judge Mackey was authorized by these defendants to write the balance of the article so far as it did not defame Talbott, then they would not be responsible for the part of it that did defame Talbott. That is the last question of fact that occurs to me which you will have to decide in determining that second phase of it that the plaintiff submits to you for your determination.

If you find that in either of the aspects under which the case goes to you the defendants are responsible for so much of this
76 article as injures the good name of Talbott as an officer and a lawyer, then inasmuch as the article on its face is a libel, if they are responsible for that part of it that libels Talbott, because they either directly or by implication occasioned the publication of it, then the plaintiff has proved a right to recover, and you would be concerned in ascertaining what the rules of law are concerning the measure of his damages.

When a man injures another by inadvertence, and not because he knowingly did something he did not have a right to do, he must always make fair money compensation, no matter what his motives were. That is all he does have to do, because when he makes fair money compensation the other man is in as good a position as the law could put him in if the damage had not been done to him. But when a man not only does an unlawful thing which injures another, but does it for the purpose of injuring him, does it out of motives of vindictiveness or animosity or of hatred, or even does it with a wanton and wilful disregard of the other's rights, then you see the situation of mind in which the actor was in the one case is different from the situation of mind he was in in the other case where he merely did it inadvertently and not intentionally.

Now, the law draws a line between those two classes of cases, and says that in the one case where there is the mere injury from the doing of an unlawful thing, and there is not a malicious condition of mind, the damages can only be compensatory damages; whereas, in the other class of cases, where the injury is not only done by the commission of the unlawful act, but is done with the purpose of
77 inflicting damage or harm, or done in such a condition of mind as shows a wilful, wanton and reckless disregard of the rights of the person injured, the jury can give, in addition to compensatory damages, if they see fit, damages which in the law are known as punitive or smart money damages; and the purpose of the law in permitting punitive damages in such cases is twofold: first, to punish the offending party in proportion to the wrong he had done to the other; and secondly, to make such an example of him as will deter other people from offending in like manner in the future. It is on this theory only that you were permitted to hear and to know everything that had been heard and known by Pickford and Walter before the time this article was published. It results in this: that if you do find that they are liable, when you come to consider what the damages shall be, you will be able to decide the question whether at the time of the publication they made it believing that what it said was true, and did it only for the purpose of vindicating their own good names in the community, or whether they did not believe it was true and did it for the purpose, wilfully, of injuring and hurting the plaintiff. So you see it makes that difference. In other words, you in determining the question whether you will give smart money damages, always have to know, as far as you can, what was in the mind of the man concerned at the time when he did the un-

lawful act, because you cannot know whether his mind was in a malicious condition unless you know what was present to it. Therefore they were permitted, so far as they could bring evidence,
78 to show what was present to their minds just before the publication, so that you could have that present in your minds when you were deciding the question whether they were in a malicious condition of mind or not. Therefore, if you find in favor of the plaintiff you will first determine what sum will fairly compensate the plaintiff for the injury that he has sustained in his good name and reputation as District Attorney in Maryland, and also as a member of the legal profession in Maryland. Then, if you find that the publication was made maliciously, as I have defined it to you, you may give him in addition to compensatory damages such sum as will punish the defendants in proportion to the wrong they have done, and serve as a deterrent, to prevent other persons from offending in like manner. You will have to draw a distinction, if you find either of the defendants liable, which will determine whether they are both liable. There is no theory upon which the case goes to you which would justify you in finding one of the defendants liable just because the other is liable. If you find one responsible, then you will have to decide whether the evidence proves the other is responsible, and the rules governing the determination of that question are the same respecting each defendant.

Is there anything else counsel wish to suggest?

Mr. DAVIS: I ask your Honor to say to the jury that there is no evidence before the jury as to the character of the second publication.

The COURT: The only theory upon which any evidence was submitted to you about the fact of a second publication was to afford the defendants a reasonable chance to meet Elliott's testimony—
79 he giving testimony which tended to show that the defendants were responsible for both publications, and they saying "No, we are only responsible for one publication, and this is the one" —to aid you in deciding the question whether or not Elliott might have been mistaken in connecting them with the first. That is the only theory upon which the second publication had anything to do with the case.

You may retire, select your foreman, and deliberate upon your verdict.

All of the foregoing proceedings were had and all of the exceptions taken and noted before the jury retired to consider of their verdict.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the defendants by their counsel severally prayed the Court to sign and seal this, their bill of exceptions and make the same a part of the record, to have the same force and effect as to each and every of the exceptions taken by the defendants and each of them, and noted by the Court as aforesaid, as if the same had been set forth in a separate bill of exceptions, signed and sealed by the Justice presiding at the trial, which was granted, and accordingly the Justice presiding signs and seals this, the said bill of ex-

ceptions, to have the force and effect aforesaid, now for then, this 15th day of May A. D. 1906.

DAN THEW WRIGHT. [SEAL.]

Settled by consent:
SAM MADDOX,
H. E. DAVIS,
For Defendants.
ANDREW LIPSCOMB,
Of Counsel for Plaintiff.

80 *Memorandum.*

May 21, 1906.—Time to file Transcript of Record in Court of Appeals extended to July 16, 1906.

Order for Preparation of Record on Appeal.

Filed May 22, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 45662.

HENRY M. TALBOTT, Plaintiff,
vs.
THOMAS H. PICKFORD ET AL., Defendants.

The clerk will please prepare a transcript of the record on the appeal of defendants herein, and include therein the following:

1. Declaration.
2. Pleas.
3. Joinders of issue.
4. Memorandum of verdict.
5. Judgment, appeal and prolongation of term.
6. Memorandum appeal bonds.
7. Order making bill of exceptions of record.
8. Bill of Exceptions.
9. Order extending time for filing record.

SAM MADDOX,
Of Attorneys for Defendants.

81 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 80, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45,662 at law, wherein Henry Maurice

Talbott, is Plaintiff, and Thomas H. Pickford and John H. Walter are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington in said District, this 9th day of July, A. D., 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme Court. No. 1698. Thomas H. Pickford *et al.*, appellants, *vs.* Henry M. Talbott. Court of Appeals, District of Columbia. Filed Jul- 10, 1906. Henry W. Hodges, clerk.

THURSDAY, *October* 18*th*, *A. D.* 1906.

No. 1698.

THOMAS H. PICKFORD and JOHN H. WALTER, Appellants,
vs.
HENRY M. TALBOTT.

The argument in the above entitled cause was commenced by Mr. Samuel Maddox, attorney for the appellants.

FRIDAY, *October* 19*th*, *A. D.* 1906.

No. 1698.

THOMAS H. PICKFORD and JOHN H. WALTER, Appellants,
vs.
HENRY M. TALBOTT.

The argument in the above entitled cause was continued by Mr. Samuel Maddox, attorney for the appellants, and by Messrs. W. M. Ellison and John Ridout, attorneys for the appellee, and was concluded by Mr. Henry E. Davis, attorney for the appellants.

On motion, both sides are allowed to file additional briefs herein if so advised.

No. 1698.

THOS. H. PICKFORD and JOHN H. WALTER, Appellants,
v.
HENRY M. TALBOTT.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a judgment for $8500 recovered by the plaintiff in an action for libel.

The declaration of the plaintiff, Henry M. Talbott, is in three counts. The first, alleged, that on and before December 7, 1901, plaintiff was State's attorney for Montgomery County in the State of Maryland, and had been elected to said office by the voters of said County. That as such officer it was his duty to conduct the prosecution of all persons accused of crimes committed in said County, before the grand and petit juries thereof. That well knowing plaintiff's good name and reputation as such officer, and with the intent to deprive him of the same, and bring him into scandal and disrepute among his neighbors and other citizens of Maryland, the defendants, Thomas H. Pickford, and John H. Walter, on December 7, 1901, composed and published a libel concerning the

plaintiff. The count set out certain parts of the publication. The second and third counts, in addition to the allegations of plaintiff's public position as aforesaid, alleged that he was a lawyer in good standing in the said County where he lived, and that the publication of the libel was made maliciously to destroy his good name and reputation both as a lawyer and as officer aforesaid. The alleged libelous article was alleged to have been printed in a newspaper published in the District of Columbia, and circulated therein and in Maryland, called the Sunday Globe. It was set out in full in both counts. It is unnecessary to repeat it here, because it is not denied that it is libelous *per se*, and no exception was taken to the charge of the Court wherein it was so characterized. It is sufficient to say that it purported to be a vindication of defendants and others who had been indicted in Montgomery County, Maryland, for the crime of arson, while plaintiff was State's Attorney for said County, and accused him of combining with persons called "blackmailers," to procure a false indictment, and of otherwise acting improperly in the prosecution until compelled to dismiss the same, etc.

The defendants pleaded not guilty to each count, and issue was joined thereon.

Plaintiff offered one William J. Elliott as a witness, whose evidence was, substantially, that he published the Sunday Globe in 1901, a copy of which, dated December 8, 1901, he identified as containing the libelous article under the heading—The History of a Crime. That Judge Thomas J. Mackey saw him about the case of defendants, and they came to the office and stated it. The judge said the article would create an excitement. Witness objected that it was libelous, which the judge said was true, but witness was willing to publish it for the "public good." Pickford and Walter undertook to save witness harmless. They paid $50 or $100 for the publication and $2 for a boy to take 500 papers to Rockville, Maryland, and distribute them. Pickford gave instructions for the boy to sell all he could and distribute the rest. Pickford and Walter were at the office five or six times; once together. Judge Mackey was with them once. Judge Mackey brought the manuscript of his article, blocked out in the rough, with a synopsis of the facts in it, or an epitome of the case. Have looked for this manuscript and cannot find it. On cross-examination, witness said he had known Mackey for some years. That Mackey brought him the article. Witness did not remember that it was headed—"Oppression under the Form of Law." It wasn't signed by Mackey. Did not publish as Mackey had written it. May have told him it was too technical—too dry. Told him witness would rewrite or elaborate it. Did not remember Mackey's saying afterwards that he did not recognize it. May have told Mackey he had put "Hot stuff" in it to make it readable. Printed another article on the following Sunday (December 15), the material for which was furnished by Pickford. (This second article, written by one Bradshaw, though frequently alluded to by witnesses was not offered in evidence.)

Witness further said he did not say he put "hot stuff" in the

first article. Mackey furnished the epitome written, and added to it in talk, and the whole was reproduced in the first article. The article was prepared during the week before publication. Mackey came alone first and later with Pickford when the conversation was general. Was not certain if it was the first or second article that the boy was to distribute. Changed the second article before printing. Got money from Pickford for both articles.

The copy of the Globe for December 8 was then produced and the article read in evidence. The boy who distributed the papers at Rockville was unable to say whether it was on December 8 or 15. Plaintiff testified briefly as to his official position and profession on and before December 8, 1901, and to the fact that the Globe was circulated in Rockville containing the first publication, as he thought. One was left on his porch. He was cross-examined at great length relating to the finding of the indictment, his acquaintance and relations with the alleged black-mailers Hopp and Hudson, his knowledge of, and presence at certain trials of cases against them. No objection was made on his part to the scope of this cross-examination; but the Court finally terminated it, as will hereafter appear.

The witness Elliott was then recalled by the plaintiff, and his testimony tended to show that the papers were wrapped in the Globe Office, and several hundred sent to Pickford's place of business. Pickford suggested that witness mail them, and furnished a list of names of addressees. That he sent the "proof" of the article brought by Mackey, after he had remodelled it, to Pickford. Under cross-examination, he said, that he told Pickford he would remodel the Mackey article and send him the proof. Walter was present when Pickford paid the money, and furnished part of it. Best recollection was that the papers bundled in the office contained both issues; that is of December 8 and 15. Other evidence for defendants related to the second article of publication and to facts and circumstances relating to the burned property in Maryland, its value, etc., to the indictment for burning the same, found more than two years thereafter, and to the manner of its prosecution and final dismissal.

Defendant Pickford testified on his own behalf at length. That part of it relating to the publication of the libel is substantially as follows: Shortly after the dismissal of the indictment, Judge Mackey suggested that he would write an article about it, and asked me to come to his office with Mr. Walter and hear what he had written, which we did. I never saw it until it was published in the Globe of December 8th. With this I had nothing whatever to do and did not hire the boy to go to Rockville. What I wanted was an article stating the proceedings in the Police Court and Talbott's testimony there, that he had never given either Hopp or Hudson a dollar, but subsequently when confronted with the fact confessed that he did give them a check and some money besides. Then I wanted the Grayson matter in the paper and also a case that happened in Maryland. I had also heard of a Maryland case in the Courts and got some one to look it up, and another case in Maryland

where some man was arrested for murder, and it was supposed that he paid Talbott money to be released. Up to December 8th I had never seen Elliott. Between that date and the 15th Bradshaw wrote an article which I did not see until Elliott sent for me. I went down with Mr. Walter, approved of the article, and agreed to take a thousand copies and to pay 5 cents apiece for them. This is the only money I ever paid Elliott.

I took a lot of the copies of the paper of December 15th and gave them to my Maryland customers when they came in. I did not send them out *any* by mail. After my interview with Mr. Elliott I never saw him from that day to this, until he appeared in Court. I did not request him to appear as a witness in my behalf in this trial.

Cross-examined, he said: "Judge Mackey wrote the article shortly afterwards, without any request from me. He told me he had made as much money writing for magazines as he did as an attorney, and was going to write up this case in the interests of justice. I did not pay him a cent for it. He read a part of it to me, but not as it appeared in the Globe. I could not recognize the article in the paper of December 8th as Judge Mackey's. All that I remember of it is that it contained the Police Court proceedings. He told me he would have it published in the Post, but said nothing whatever about the Globe until afterwards. I was never at Mr. Elliott's office but once, and then after the publication of December 8th. My object in publishing the article of December 15th was to get before the people of Montgomery County and my customers something that would show all the proceedings that happened in Court, and that we could substantiate in every particular. I wanted all those things brought before the public.

"After it was published Bradshaw met me and said "That is not right at all" and went off. I never saw his article until I saw it in Elliott's office. I did not see the proof of the article. Elliott read it over to me and told me he would make some changes to make it more readable. He is mistaken in saying that I paid anything for the first article, for I did not. Judge Mackey's article as he read it to me consisted of Court proceedings and was backed up by evidence."

Defendant John H. Walter testified as follows:

"About the 1st of December, 1901, Pickford told me that Judge Mackey was going to write an article on the Rockville case and asked me to go with him to Judge Mackey's office to hear what he had written. The Judge read something which he said he was going to publish in the papers. This is about all I know of the article.

"Subsequently Bradshaw informed me he was going to write an article. I knew he was accustomed to writing articles for the daily papers, and especially articles on local politics and Mr. Pickford one day asked me to go with him to the office of the Globe, the editor having asked that we appear there, and wanted to read some article to us. He read the article over, and we agreed that if it was printed in his paper we would take a thousand copies and pay

five cents apiece for them. The article seemed to be pretty good and to embody the facts. We paid for the papers and quite a number of them were distributed. Five or six hundred of our thousand copies were never distributed.

I had nothing whatever to do with the article of December 8th."

But two exceptions were taken by the appellants during the trial, and only so much of the evidence recited at length in the bill of exceptions, has been set out in the preliminary statement as is necessary to the elucidation of the questions raised by the assignment of errors.

The plaintiff having testified briefly on his own behalf in support of the formal allegations of the declaration, was examined, without objection, on some matters relating to his investigation of the burning of the house in Maryland, for which the defendants had been indicted. The Court of its own motion interrupted the examination, making this statement to counsel for defendants: "On what line are you pursuing this inquiry?" Counsel replied: "I am going to show, if I can, the absence of good faith in this indictment on the part of the District Attorney;" (meaning plaintiff). After some discussion the Court said: I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth without pleading it. * * * You may prove anything Pickford heard the witness say before the article was published." Defendant's counsel: "I want to prove by this witness, first by his own testimony in connection with the transaction complained of, that he is not the man of good character that he says he is." Plaintiff's counsel interposed to say that he did not object. Defendant's counsel continuing said: "Secondly, I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy." The Court: "You may prove anything Pickford heard the witness say before the article was published." Counsel for defendants: "I understand the Court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury, and whether he investigated the character of the man." The Court: "Under your statement that you propose by that line of testimony to prove that the District Attorney acted in bad faith, I will not hear it because I do not think it is relevant for that purpose." Counsel for defendants noted an exception, and the first assignment of error is founded thereon.

It does not appear from the foregoing recital what particular questions were intended to be propounded to the plaintiff, but it is contended that the intent was to show the plaintiff's bad character. Many authorities hold, and, as stated in 2 Greenleaf Ev. Sec. 424, "it seems well settled that the defendant may impeach the plaintiff's character by general evidence in order to reduce the amount of damages," under the general issue. Some hold, also, that, where the plaintiff has been charged with being a person of criminal or vicious practices, evidence of the commission of particular acts of the kind charged, or of bad reputation in regard thereto, is

also admissible. These questions are not involved, because no such evidence was intended to be elicited from the plaintiff. The Court understood what counsel first expressly stated, that the attempt was to show bad faith in the plaintiff, as State's Attorney, in procuring the indictment of defendants for arson, and in conducting the prosecution. In other words, he regarded it as an attempt to prove the truth of the published words without a plea of justification. In this view he was clearly right in excluding the inquiry. It is a well settled rule, that evidence tending to show the truth of the alleged libelous words is inadmissible, under the general issue, either in bar of action or in mitigation of damages. (2 Greenleaf Ev. Sections 424, 425; Townsend, Libel and Slander, Sec. 409.)

The Court was apparently correct in his understanding of the proposed line of inquiry; but if mistaken, it was the duty of counsel to correct his misapprehension by a specific statement of the questions, they desired to ask, or of the particular facts they proposed to inquire of.

The next assignment of error is on the exception taken to the refusal of the following special instruction asked by the defendants:

"1. The jury is instructed that this action is based solely upon the article printed in the issue of the newspaper known as the Sunday Morning Globe, of December 8, 1901, and that, in order to entitle the plaintiff to recover, the jury must find that the exact language of that article, or such part thereof as the jury under the instructions of the Court shall find to be libelous and as are set forth in the declaration, was or were written, or authorized to be written, or published, or authorized to be published by the defendants, or one of them, and its verdict in any case can be against only such one, if either, of the defendants as is shown by the evidence so to have written or published, or authorized the writing or publishing of the same. And, in considering whether the defendants, or either of them, authorized the publishing of the said article, or any such part thereof, as set forth in the declaration, it will not be sufficient to find from the evidence only that the defendants, or either of them, had knowledge, in advance of the publication of the said article, that it was to be published and expected its publication; the jury must find from the evidence that the defendants or one of them, authorized, directed or participated in the publication."

The charge given by the Court relating to this point is in the following language:

"Therefore this article on the face of it, as a matter of law, is libelous, and its meaning libeled this plaintiff. The question for you to decide is whether these defendants have done it, or whether somebody else has done it. There are two theories upon which the plaintiff submits to you the proposition that the defendants have libeled him. The first is predicated upon the testimony of Mr. Elliott, who gave testimony tending to show that the defendants procured him to publish this article after they knew what was in it, about the plaintiff; that the defendants had procured him to publish this article knowing what it contained with respect to the plaintiff, Mr. Talbott. If they did, it is immaterial whether they

wrote it or not. If they knew what this article was going to be in advance, as the testimony of Mr. Elliott indicates, if they procured him to publish the article in so far as it referred to Talbott, then they are liable for it, although they did not write it themselves. But if, when you consider Elliott's testimony, opposed as it is by the testimony of the defendants, and perhaps other witnesses, you conclude that the fact of that matter was that these defendants, and neither of them, did in person go to Elliott's office before the publication of the article of December 8th, and that neither of them did actually procure him to publish that article before he published it, in respect of its allegations as to Talbott, then in that regard they are not responsible for the publication on that theory as submitted by the plaintiff.

"Then you would have to proceed to consider whether or not after Elliott had printed the article in his paper, they secured that particular paper and gave it circulation; because the publication of an article which on its face is a libel, injures the good name of the individual libelant independent of who wrote it. So that, inasmuch as this article is on its face a libel, if the defendants or either of them secured copies of the paper after it was published and themselves put it in circulation after it was published, then they would be responsible for it the same as if they had written it themselves. But if not, then they would not be responsible at all, for this libel, unless it be upon the other theory the plaintiff submits, which is as follows: That although they did not write the article themselves, that although the jury may find they did not go to Elliott's and get Elliott to print the article, that nevertheless they procured Judge Mackey to write the article and that they are responsible for it on that account.

"That depends entirely upon whether Judge Mackey wrote an article on his own account and carried it to Elliott for publication on his own account or whether he wrote an article and carried it to Elliott, as the mere conveyance, from these defendants. It is not necessary that they should have said to Judge Mackey, in express words, "You write an article, this article, and you carry this to Elliott and get him to put it in the paper for us;" but it is necessary for you to find from the evidence before you can hold them responsible for anything that Judge Mackey did, that they either directly or by implication made him their medium for the purpose of transmission to Elliott for publication of the article. If you find that they knew Judge Mackey was about to take an article to Elliott, that is not sufficient. They did not have to stop him. It is necessary, as I have said, that you draw the distinction and ascertain whether the article carried by Mackey was his own article, taken of his own volition, or whether it was an article carried to Elliott by Judge Mackey as the mere conveyance from them of their plan and purposes as distinct from Judge Mackey's plan and purposes. If you find that he was their agent in that regard, then they are responsible for what he wrote upon this subject, to the extent that they authorized him to write. If he was their

agent for the purpose of writing the article, it is not necessary that they shall have said to him, in order to be responsible for his language, "Write this, that, and the other thing," in so many words. But it is necessary that they either directly or by implication authorized him to write, under such a general authority as fairly carried with it the authority to express on their behalf what the article contains. If so, they would be responsible for what he wrote in that regard. Otherwise, not.

"There, however, you have to make another inquiry, as follows: Even if you find that they did authorize Mackey to carry to Elliott for publication an article, they are not yet responsible for this article unless you find this is the article that they fairly authorized him to carry. That is to say, inasmuch as the libel of this article respecting Talbott grows out of what this article says about Talbott—not about some body else—you will have to find before you can hold them for what Judge Mackey did that Judge Mackey was their agent for the purpose not only of writing the article, but was their agent for the purpose of writing substantially about Talbott what this article says about Talbott; because, in so far as this article mentions Talbott in a way that injures his name as a lawyer and official, if you find that those parts of this article were written by Elliott, and not by Judge Mackey, and yet you find that Judge Mackey was authorized by these defendants to write the balance of the article so far as it did not defame Talbott, then they would not be responsible for the part of it that did defame Talbott. That is the last question of fact that occurs to me which you will have to decide in determining that second phase of it that the plaintiff submits to you for your determination.

"If you find that in either of the aspects under which the case goes to you the defendants are responsible for so much of the article as injures the good name of Talbott as an officer and a lawyer, then inasmuch as the article on its face is a libel, if they are responsible for that part of it that libels Talbott, because they either directly or by implication occasioned the publication of it, then the plaintiff has proved a right to recover, and you would be concerned in ascertaining what the rules of law are concerning the measure of his damages."

In our opinion this charge, no part of which was excepted to, clearly and fairly stated the law applicable to the several phases of the evidence, offered by both parties, relating to the publication of the so-called Mackey article on November 8, 1901, to which publication alone the consideration of the jury was, at the request of the defendants, expressly confined. As it embodied all that was contained in the refused instruction the denial of the latter was not error.

The judgment will therefore be affirmed with costs.

Affirmed.

FRIDAY, *December 14th, A. D.* 1906.

No. 1698. October Term, 1906.

THOMAS H. PICKFORD and JOHN H. WALTER, Appellants,
vs.
HENRY M. TALBOTT.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

December 14, 1906.

Dissenting: Mr. Justice McComas.

TUESDAY, *January 15th, A. D.* 1907.

No. 1698.

THOMAS H. PICKFORD and JOHN H. WALTER, Appellants,
vs.
HENRY M. TALBOTT.

On motion of Mr. Samuel Maddox, of counsel for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of fourteen thousand dollars; and it is further ordered that the mandate in said cause is stayed for five days.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Thomas H. Pickford and John H. Walter, Appellants, and Henry M. Talbott, Appellee, a manifest error hath happened, to the great damage of the said Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what

of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of January, in the year of our Lord one thousand nine hundred and seven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

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(*Bond on Writ of Error.*)

Know all men by these presents, That we, Thomas H. Pickford and John H. Walter, as principals, and Percy W. Pickford, as surety, are held and firmly bound unto Henry Maurice Talbott in the full and just sum of Fourteen thousand Dollars to be paid to the said Henry Maurice Talbott, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of January, in the year of our Lord one thousand nine hundred and Seven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Thomas H. Pickford and John H. Walter, Appellants, and Henry Maurice Talbott, Appellee, a judgment was rendered against the said Thomas H. Pickford and John H. Walter and the said Thomas H. Pickford and John H. Walter having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Maurice Talbott citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Thomas H. Pickford and John H. Walter shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

THOMAS H. PICKFORD. [SEAL.]
JNO. H. WALTER. [SEAL.]
PERCY W. PICKFORD. [SEAL.]

Sealed and delivered in the presence of—
L. B. WOODWARD.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1698. Thomas H. Pickford *et al.*, Appellants, *vs.* Henry M. Talbott. Bond on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jan. 17, 1907. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry M. Talbott, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Thomas H. Pickford and John H. Walter are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of January, in the year of our Lord one thousand nine hundred and Seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Jan. 17, 1907.

JOHN RIDOUT,
Counsel for Henry M. Talbott.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 17, 1907. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 60, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas H. Pickford and John H. Walter, Appellants, *vs.* Henry M. Talbott No. 1698, January Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of January A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,542. District of Columbia Court of Appeals. Term No. 209. Thomas H. Pickford and John H. Walter, plaintiffs in error, *vs.* Henry M. Talbott. Filed January 24th, 1907. File No. 20,542.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 209.

THOMAS H. PICKFORD AND JOHN H. WALTER,
PLAINTIFFS IN ERROR,

vs.

HENRY M. TALBOTT.

ARGUMENT AND BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

Statement of the Case.

The Pleadings.

The declaration is in three counts, the first of which was taken from the consideration of the jury (R., pp. 36, 37).

In the second count of his declaration the plaintiff, defendant in error, alleges that at the time of the publication of the libel and the commencement of the suit he "was the incumbent of the office of State's attorney for the county of Montgomery, in the State of Maryland, * * * and as such officer was always reputed amongst the citizens of said county and State as well as among other citizens of the United States, and elsewhere, and deservedly so reputed to be upright, honest,

just and faithful in the performance of the public duties imposed upon him by his oath of office and the laws of the State of Maryland, in the prosecution before the grand and petit jurors of said county, in the courts thereof and of the said State, of persons lawfully arrested, accused and indicted for crimes and misdemeanors committed within said county against the laws of said State;" and that by reason and means of the publication of the libel complained of "the plaintiff is not only hurt in his good name, fame, credit and esteem in his position as the said State's attorney of Montgomery county, Maryland, and among the citizens of said State and of the District of Columbia, but has also fallen in great discredit among them in that respect."

The third count alleges that at the time of the publication of the alleged libel "there was pending in the proper court of the said county and State an indictment for crime and misdemeanor against one Thomas H. Pickford, one John H. Walter, one Aaron Bradshaw and one Granville C. Shaw for an offense against the laws of said State and county for the unlawful burning of a certain house located in said county and State, * * * That one James Hudson was a witness before the grand jury upon whose evidence the indictment was found."

The *ad damnum* of the count is identical with that of the second count.

To both counts the defendants pleaded the general issue.

The Facts.

On the morning of December 8, 1901, there appeared in the *Sunday Globe*, a newspaper printed in Washington, the article set out twice *in extenso* in the declaration. On the following Sunday a second article was printed in the same paper, intended, as was explained by Aaron Bradshaw, who wrote it, to bring out the testimony in the Hudson conspiracy case in the police court, and the decision of the Court of Appeals of the District of Columbia in the case of David C.

Grayson and others against Frank I. Wood and others (R., p. 28).

The editor of the paper, William J. Elliott, was the first witness called in behalf of the plaintiff, and testified that an article was brought to him for publication by Judge Mackey, signed by the judge. The article was prepared during the week previous to its publication and remodeled by putting in a lot of "hot stuff," so as to make it readable.

The paper had no circulation in Rockville beyond a few mail subscribers. A boy was employed and furnished with a number of the papers to distribute in Rockville, but neither Elliott nor the boy so employed could remember whether the first or second article was so distributed (R., p. 22).

On this point the plaintiff Talbott testified that he thought the boy came out with papers of the 8th of December, though he was not certain of this. He saw the second article and "thought we had suits on both" (R., p. 25).

Elliott further testified, in the forenoon and when first on the stand, that he had received fifty or one hundred dollars from Pickford and Walter, with the understanding that a boy was to be employed to distribute a number of copies in Rockville (R., p. 20).

On cross-examination he testified that he got one hundred dollars from Pickford, but didn't know for which article it was (R., p. 21).

After recess Elliott was recalled and testified that he had received pay from Pickford for both articles.

On cross-examination he was asked the following question:

"Mr. Elliott, when you were on the stand before recess you did not remember which of these two articles the proof of was sent to Mr. Pickford. What has refreshed your recollection in that particular?"

To which he answered:

"I went over the whole thing *retrospectively* and remembered that the first article by Judge Mackey that he brought

to the office was not such an article as I would want to publish. There were several objections that I made to it. I so told Mr. Pickford that I would remodel it and gave him the proof" (R., p. 26).

In his own behalf the plaintiff testified that he had been State's attorney at Rockville for four years, having been elected in 1899. On cross-examination he further testified that the crime for which Pickford was indicted was first brought to his attention by a letter from a newspaper man in Washington named Thompson, whom he had never seen and did not know. The crime referred to was a fire which had occurred two years and four months before he qualified as State's attorney and during the incumbency of his predecessor, Mr. Kilgour. He did not ask Mr. Thompson if the matter had ever been brought to the attention of Mr. Kilgour or make any inquiries of the latter.

During the cross-examination of the witness touching his acquaintance with Thompson and Hudson, the court of its own motion interrupted and declined to let the cross-examination proceed further on that *line* (R., p. 23).

The witness remembered that on the day set for the trial of Pickford at Rockville he asked for a postponement, which the court declined to allow and a *nolle prosequi* was entered (R., p. 24).

He also admitted that he was one of the parties defendant in the case of Grayson *vs.* Wood, above mentioned (R., p. 25).

In behalf of the defendants, plaintiffs in error, Judge Mackey testified that he had been employed by Pickford to present and argue a motion to quash the Rockville indictment (R., p. 26). After attending the trial and returning to Washington he wrote an article entitled "Oppression under the form of law" of his own volition and without any request in that behalf from either Pickford or Walter. He read part of the article over to them and assured them that they were in no way responsible for it, as it was *his* article.

The article was taken to Elliott, a friend of Judge Mackey, with request that it be published in the *Globe;* but it was never printed as written, the editor explaining that he had put some "hot stuff" in it (R., pp. 26, 27).

The second article was written by Bradshaw, but was also much changed by Elliott, who put in a "great many things" that were not in the original (R., p. 28).

Plaintiff in error Pickford is a resident of Washington and prior to 1902 conducted a grocery business at 9th street and Louisiana avenue. Subsequently he became a dealer in real estate. In 1897 he and appellant Walter owned a house in Montgomery county, which was burned. Two years afterward a customer of his named Hopp told him he was going to have trouble about the fire, and that Hudson and Talbott were going to prosecute him for burning the house. No attention was paid to Hopp by Pickford, and on the 26th of March, 1901, he was indicted at Rockville along with Walter, Bradshaw, and Shaw. Without waiting to be arrested, he went to Rockville and gave bail for his appearance. The other persons indicted were arrested, but released by the late Justice Bradley on *habeas corpus*, on the ground that the indictment charged no offense under the laws of Maryland.

In November of that year a day was set for his trial at Rockville on this indictment. Pickford appeared with his witnesses, but the State's attorney asked for an extension. This the court said would be granted with the proviso that if the State's attorney was not ready on the day set, defendant's plea of not guilty must be confessed by the State. This the State's attorney was not willing to do and a *nolle prosequi* was entered.

Judge Mackey was retained by Pickford some months after the indictment was found to go to Rockville. At that time Mr. Maddox had not been retained. He was sick in bed at the time and when he got well went to Europe.

Testifying in his own behalf, Pickford stated that he

had not authorized or requested Judge Mackey to write the article that appeared in the *Globe* of December 8, though he had heard part of it read, and it was very different from what was afterward published. Up to December 8 he had never seen Elliott. Between that date and December 15 Bradshaw wrote an article which he did not see till Elliott sent for him. He and Walter then went to the *Globe* office, approved of the Bradshaw article as read by Elliott, and agreed to take a thousand copies of the paper, at five cents apiece, with that article in it. He then paid Elliott $50, and this was the only money they ever paid him. Though he had had nothing to do with the preparation of the Bradshaw article, he was willing to pay for its publication, so that he could get before the people of Montgomery county and his customers something that would show all the proceedings in court. He first saw this article in Elliott's office, but never saw the proof of it afterward. Nothing whatever was paid by him for the first article (R., pp. 29, 31). Judge Mackey's article as read to him contained, as far as he could remember, only police court proceedings, but not as it appeared in the *Globe*. He did not pay Judge Mackey anything for writing the article (R., p. 31).

Walter testified that after the article of December 8 appeared, Bradshaw told him he was going to write an article, but he did not see it until he went to the *Globe* office with Pickford, in response to a request from Elliott, who read the article over. We agreed if it was printed in his paper we would take a thousand copies at five cents apiece. This article seemed to embody the facts. We paid for the papers and quite a number were distributed. The witness further testified that he had had nothing whatever to do with the article of December 8 (R., pp. 32, 33).

In rebuttal the plaintiff called Alexander Kilgour, who testified that he was the immediate predecessor of Talbott as State's attorney for Montgomery county. He called on Pickford shortly after the indictment was found, at the

latter's request that he defend Shaw. He could not recall using the word "blackmailing" to Pickford, but in all probability he did. The matter had been called to his attention by the insurance people when the house was burned, and he may have told Pickford that it was an effort on the part of the insurance companies to use his office for the purpose of collecting their money.

He also called on Mr. Lipscomb in response to a telegram. He understood Lipscomb to say that the insurance companies would spend $23,000 to convict these people, but nothing was said about the disposition of this sum.

Thereupon, the evidence being closed on both sides, the court granted certain instructions requested by counsel for plaintiff and refused instructions requested by counsel for defendants, to which exceptions were duly noted. The court, of its own motion, also charged the jury, and a verdict was rendered in behalf of plaintiff for eight thousand five hundred dollars ($8,500). A motion for a new trial was made and overruled, and judgment was entered on the verdict. From this judgment the defendants below prosecuted an appeal to the Court of Appeals of the District of Columbia, which affirmed the judgment.

Assignment of Errors.

The trial court erred:

First. In refusing to allow counsel for defendants to cross-examine the plaintiff touching his conduct in respect of the Rockville indictment and the absence of good faith on his part in procuring that indictment.

Second. In refusing to grant defendants' prayer for instruction No. 1, and in charging the jury erroneously on the subject-matter of that prayer and the propositions of law thereby presented for the court's consideration.

ARGUMENT.

I.

The Cross-examination of the Plaintiff was Being Properly Conducted when Interrupted by the Court.

The whole controversy in this cause arose over that unconscionable Rockville indictment, which the late Justice Bradley decided did not charge a crime under any Maryland law. One morning in March, 1902, Pickford and Walter, reputable citizens and business men of Washington, to whom the finger of suspicion never pointed, were amazed to learn that they had been indicted at Rockville for burning a house belonging to them, and situated near Silver Spring, in Maryland.

Without waiting to learn particulars of the charge or consulting counsel, Pickford took the first train to Rockville and gave bond for his appearance when wanted for trial. Walter, more wary and wanting to first to see what the charge was, sued out a writ of *habeas corpus* when arrested on extradition proceedings, and was discharged after hearing by Justice Bradley.

Shortly afterwards Pickford was approached by a man named Hopp with offers of settlement. Hopp stated that a man named Hudson was the principal or only witness before the grand jury at Rockville, and for a proper consideration would disappear when wanted as a witness at the trial. Pickford scorned the offer and reported the matter to the United States district attorney. Detectives were detailed to take charge of the case, with the result that Hudson and Hopp were arrested on the charge of conspiracy and attempt to blackmail. At the trial in the police court, which

followed, the State's attorney of Montgomery county, defendant in error here, was present—he "came down to hear the trial" (R., p. 25).

Some days later Pickford sued Hopp before Justice of the Peace Strider for a debt, and the trial took place just across the street from the City Hall. Hudson was present as a witness for Hopp. Defendant in error "was passing" and "had a talk with" Hudson, but could not remember calling "him out two or three times" (R., p. 25). On this point Pickford testified:

"Talbott came to the door, opened it and called Hudson out four different times. He talked to him on the street, and everybody remarked how excited Talbott was about it" (R., p. 30).

Some days later a reporter of the *Post* went to see Pickford and said he had just seen Hudson in jail. Hudson then said that "he had been pulled into a scheme, and that there were people who would pay money to keep him in the case at Rockville" (R., p. 30).

The unlawful burning set up in the indictment occurred in September, 1897, while Mr. Kilgour was State's attorney at Rockville, and two years and four months before defendant in error undertook the duties of that office (R., p. 23).

The same matter had been presented to Mr. Kilgour while he was in office, by Mr. Lipscomb, at the latter's office, Kilgour having gone there in response to a telegram. He understood Lipscomb "to say that the insurance companies would spend $23,000 to convict these people." He told Lipscomb a man had a "right to burn his own house, and that the testimony of an accomplice could not convict without corroboration." Kilgour could not recall that in a conversation with Pickford he characterized the proceeding as "blackmailing," "but in all probability I did so, and that it was an effort on the part of the insurance companies to use his office for the purpose of collecting their money" (R., p. 34).

In November following the indictment, a day was set for the trial of Pickford at Rockville. He attended with his witnesses, and testified at the trial of this case as follows:

"Mr. Talbott was not ready to go to trial and wanted an extension. The court said he would grant the extension, provided that if the State was not ready to go to trial on the day set, it would confess that I was not guilty. This Mr. Talbott declined to do and *nolle prossed* the case" (R., p. 29).

This occurred on the 27th of November. Within a day or two after returning from Rockville, Judge Mackey, of counsel for Pickford, of his own motion and without being requested so to do by Pickford or Walter, wrote an article which he headed "Oppression under the form of law," touching the matter of the indictment. This article he read over in part to Pickford and Walter, and then took it to Elliott, editor of the *Globe*, and a man with whom he had had personal relations. As written by him, the article contained nothing libelous. While on the witness stand he pointed out several portions of the article which were not written by him (R., p. 27). Elliott testified that he had first published the article in the shape it was received from Judge Mackey, because it was too technical; also that he may have put "hot stuff" into it so as to make it readable. Another article appeared in the *Globe* of December 15th, but of this no complaint is made in the declaration. This article was also changed by Elliott and did not appear in his paper as originally received from Bradshaw who wrote it.

In his declaration defendant in error avers that he was "upright, honest, just and faithful in the performance of the duties imposed upon him by his oath of office" (R., p. 1).

This is the "state of the case" in which the defendant in error appeared as a witness in his own behalf. On cross-examination he was questioned touching his relations to the indictment of Pickford at Rockville. He testified that the

fire occurred during the administration of his predecessor in office, of whom he made no inquiry. It was brought to his attention by a man named Thompson, "an old gentleman living here in Washington," whom he had never seen and did not know. Thompson took him to see Hudson, who was also a "stranger" (R., p. 23).

At this point the Court, of its own motion, interrupted the cross-examination, and the following colloquy occurred:

"The COURT: On what line are you pursuing this inquiry?"

"Mr. MADDOX: I am going to show if I can the absence of good faith on the part of the District attorney."

"The COURT: I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth without pleading it. You may prove anything Pickford heard the witness say, before the article was published."

"Mr. MADDOX: I want to prove by this witness, first by his own testimony in connection with the transaction complained of in this article, that he is not a man of good character which he says he is."

"Mr. LIPSCOMB (interrupting): I do not object to your asking him that, Mr. Maddox."

"Secondly, I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy."

"The COURT: You may prove anything Pickford heard the witness say before the article was published."

"Mr. MADDOX: I understand the Court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury and whether he investigated the character of the man."

"The COURT: Under your statement that you propose by that line of testimony to prove that the district attorney acted in bad faith, I will not hear it, because I do not think it relevant for that purpose."

To this ruling of the court an exception was noted, and it constitutes the first assignment of error.

The "good faith" of the defendant in error in procuring the Rockville indictment went to the very heart of the action. If it could have been made to appear by the admissions of the witness, testifying in his own behalf, that while State's attorney he was in league with the man Hudson and the insurance companies, in a scheme which his predecessor denominated "blackmailing," the jury would have made short work of the case when they retired to consider of their verdict; and it was impossible to do this except by probing the conscience of the witness through the medium of cross-examination.

The question thus presented is so clear as to admit of but one answer—the cross-examination of the plaintiff should have been allowed to proceed. He claimed in his declaration that he was a man of good character, that he was "upright, honest, just, and faithful in the performance of the duties imposed upon him by his oath of office."

He was a stranger in the District of Columbia and had never known Pickford prior to procuring the indictment against him, and had known Walter only in a casual way (R., p. 23). With his reputation at home the plaintiffs in error had no concern. What they were vitally interested to know was why and under what pretext or circumstances he had caused them to be indicted on the testimony of a "stranger" to him, and then denied them a trial in open court.

As tending to show that he was not a man of good character, evidence of particular acts of misconduct would not have been admissible except in the way attempted—by cross-examination when he tendered himself as a witness in his own behalf.

The rule is now well settled that this may be done and is thus stated by Wigmore:

"Sec. 981. *Cross-examination not Forbidden.*—The reasons already examined (ante, sec. 979) appear plainly to

have no effect in forbidding the extraction of facts of misconduct from the witness himself upon cross-examination. (*a*) There is no danger of confusion of issues, because the matter stops with question and answer; (*b*) there is no danger of unfair surprise, because the impeached witness is not obliged to be ready with other witnesses to answer the extrinsic testimony of the opponent, for there is none to be answered, and because, so far as the witness himself is concerned, he may not unfairly be expected to be ready to know and to answer as to his own deeds. Thus, neither of the reasons has any application, and hence, so far as they are concerned, the opponent is at liberty to bring out the desired facts by cross-examination and answer of the witness himself to be impeached."

"There is a clear distinction, recognized by the authorities cited above, between impeaching a witness by proof of facts which discredit him, made independently of his examination, and by proof of the same facts elicited in his cross-examination. Proof of particular facts tending to impair his credibility, made independently of his own examination, is excluded for the reason that its admission would engender a multiplicity of collateral issues, and would frequently surprise a witness with matter which he could not be prepared to disprove. But these reasons do not apply to his cross-examination as to the same facts, because the witness, better than any one else, can explain the impeaching matter, and protect himself to the extent that explanation will protect him; the cross-examining party being bound by his replies."

* * * * * * *

"In this country, where the population is made up largely of newcomers, where time for the establishment of a reputation has not elapsed, where witnesses appear upon the stand daily who are strangers in the community, and whose antecedents are unknown, it imperils not only the rights of litigants, but the lives and liberty of defendants, to hold that such witness may not be subject to a cross-examination which may disclose, by their own admissions, something of their character, antecedents and credibility, but that the abandoned ruffian may have the same credit before the jury as the witness of unblemished probity, unless it be possible, as it rarely is, in the exigencies of the trial, and when the ap-

pearance of the witness in the community is often contemporaneous with his appearance in the witness box, to discredit him by his general reputation for truth and morality."

Oxier *vs.* U. S., 1 Ind. T., 85 (38 S. W. R., 331).

"Generally the conduct of a witness in matters disconnected from the subject of the trial, being irrelevant, cannot be given in evidence. The objections to admitting such evidence are that it raises collateral issues, and that the party against whom it may be offered would generally be taken by surprise and not be prepared to meet it. It is very desirable that the inquiries upon a trial should be confined to the issues actually joined between the parties. They attend to try those only; the attention of the jury is or should be exclusively directed to them, and not diverted to other and irrelevant matters which have a tendency to confuse their minds, and an investigation into collateral matters would protract issues into inconvenient and intolerable length. * * * There can be no doubt but that, in ordinary cases, an inquiry, addressed to any but the assailed witness, as to any particular act derogatory to his character or as to any specific blemish in his reputation, should be excluded. * * * (However, a fact derogatory to a witness' character) may be proved provided it does not raise or tender a collateral issue. * * * A witness may be asked if he has not perpetrated some offense, or been guilty of some moral obliquity, which would if true impair the weight of his evidence. * * * That would not, however, raise any issue for trial, as, whatsoever his answer might be, the party asking the question could not controvert it."

People *vs.* Jackson, 3 Park Cr., 395.

If this may be done "in matters disconnected from the subject of the trial," as stated by Strong, J., in the case last cited, there can be no reason in law or logic why it should not be permitted when the inquiry goes to the very essence of the "subject of the trial."

The proffer thus made clearly was, according to the court's apprehension, of a *line* of inquiry, which the court declined to allow counsel to pursue upon the stated ground "that it

was an attempt to prove the truth without pleading it," and the colloquy ended on the part of counsel by pointing out to the court a distinct matter, namely, that appellee had presented appellants to the grand jury and caused them to be indicted on the testimony of the man Hudson, whom appellee did not know, and did not take the pains to investigate before publicly subjecting appellants to the stigma and ignominy of having committed an infamous offense.

In its opinion the Court of Appeals says of this incident (R., p. 49):

"The court was apparently correct in his understanding of the proposed line of inquiry; but if mistaken, it was the duty of counsel to correct his misapprehension by a specific statement of the questions they desired to ask, or of the particular facts they proposed to inquire of."

But the learned jurist who delivered the opinion of the Court of Appeals lost sight of the fact that the *line* of inquiry was being pursued during cross-examination, where the rule is different from that which governs tenders of original or direct evidence.

Eames *vs.* Kaiser, 142 U. S., 491, was an action to recover damages for the wrongful issue and levy of two attachments, upon affidavits that Kaiser "was about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors." Kaiser testified as a witness in his own behalf that the day of the attachment or the next a debt due and owing to him was put in the form of notes, and being under cross-examination was asked what he had done with the notes. Objection was made on the ground that what had transpired after the attachment was immaterial and irrelevant, and the objection sustained. *Held*, error on appeal. The court, by Mr. Ch. J. Fuller, said:

"Upon the issue involved, the defendants were entitled to a wide latitude in cross-examining the party charged with

fraudulent conversion when testifying for himself. If the particular indebtedness to Kaiser was turned into notes, and the notes were converted into money, before the attachment issued, or simultaneously, that fact sustained the charge of the conversion of the property into money, and with the other evidence justified the inference that this was for the purpose of placing it beyond the reach of his creditors. Defendants were not called upon in propounding the question to the witness to state what they expected to prove by him, which it would have been ordinarily quite impossible for them to do, but inasmuch as he had testified in his own favor that the notes were obtained at or about the time of the attachment, the defendants were entitled to push the inquiry further and elicit from the witness all the circumstances surrounding the obtaining and final disposition of that paper."

See also Sonnentheil *vs.* Guaranty & Trust Co., 10 Texas Civil Appeals, 286, 287.

"It must appear that the excluded testimony was material; and the almost universal rule of practice is that what that material testimony was must be expressly called to the attention of the trial court at the time of its exclusion. * * * In a few instances there may be an exception—as in cross-examinations, where the examining counsel may not know what the answer will be, or is exercising a right to test the witness."

Lamar, J., in Griffin *vs.* Henderson, 117 Ga., 383.

That the matter to which the interrupted line of inquiry was directed was admissible, is abundantly supported by the authorities.

"Character is conduct; it is independent of reputation. Character must be true, while reputation may be false."

This claim of the appellee was put in issue by the plea of not guilty.

"The plea of not guilty puts in issue the general character [reputation] of the plaintiff, and therefore upon a plea of not guilty only, the defendant may give in evidence the gen-

eral bad character [reputation] of the plaintiff before and at the time of the publication complained of."

Townshend on Slander, p. 669, sec. 406.

"Plaintiff complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant, then, to be permitted to show that the plaintiff's character was previously tainted with suspicion; or that in fact he had little reputation to lose? To deny this would be to decide that a man of the worst character was entitled to the same measure of damages, with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honorable merchant; a virtuous woman with the most abandoned prostitute."

Newell on Libel and Slander, p. 290, sec. 39.

Earl of Leicester *vs.* Walter, 2 Camp., 251, decided in 1809, was an action of libel. In commenting on the case Sir James Mansfield, C. J., said:

"Besides, the plaintiff's declaration says that he had always preserved a good character in society, from which he had been driven by the insinuations in the libel. Now, the question for the jury is whether the plaintiff actually suffered this gravamen or not. Evidence to prove that his character was in as bad a situation before as after the libel must therefore be admitted."

"It is well settled that the defendant may, in mitigation of damages, show that the plaintiff's character was previously bad, because a person of disparaged fame is not entitled to the same measure of damages for any particular charge calculated to affect reputation, as a person whose character was previously unblemished; and because a character of the first description is not susceptible of the same degree of injury as the other, or may perhaps be so bad as to be incapable of receiving injury.

"And the evidence may tend, either to establish that the plaintiff's character is generally bad, or that he has a bad reputation with reference to the kind of vice imputed in the alleged slander."

Witherbee *vs.* Marsh, 20 N. H., 563.

Wilson *vs.* Noonan, 27 Wisc., 598, was an action of libel for publishing of the plaintiff, of and concerning his official action as a member of the State senate, defamatory matter. In defense an offer was made to prove that the general reputation and character of the plaintiff at the time he was a senator was bad, and it was objected that this was too broad. The court say:

"The cases are numerous which hold that evidence of the plaintiff's bad character in relation to the particular fault charged is admissible, and that such evidence is admissible under the general denial.

* * * * * * *

"Instances are not wanting of men who, in private life, have sustained and do sustain good reputations, and yet in public and official capacities have been dishonest and corrupt. * * * Should a person of this class bring an action against one who had libeled or slandered him by falsely charging him with corrupt conduct in office, if the defendants were confined to proof of the personal reputation of the plaintiff as a citizen, and prohibited from showing his profligacy and corruption as an officer, such plaintiff, as regards damages, would stand equally as well as though he were an honest and incorruptible public officer. This obviously would be a violation of the rule which permits evidence to be given of the plaintiff's bad reputation in relation to the particular fault or offense charged in such slander or libel, and might and probably would work great injustice to the defendant."

Conroe *vs.* Conroe and wife, 47 Pa. St., 198, was an action for slander in charging plaintiff's wife with unchastity. The court said:

"The plaintiff seeks to recover compensation for the loss of her character, not her reputation for truth, integrity, sobriety or industry, but her reputation for chastity. That she put in issue. The law presumed it good, and therefore valuable to her. If that was not damaged, she has sustained no injury and is entitled to no compensation. * * * Its

real value was therefore the proper subject for inquiry. It would be strange if the defendant might not show it to be worthless."

When the libelous article charges a particular offense, it is admissible under the plea of not guilty to show general reputation in that particular and specific acts in the line of the offense charged.

"Whether the general character of the plaintiff was put in issue by the pleadings or not, it is well settled that evidence of previous general bad character was admissible under the plea of not guilty. It is said to be admissible upon two grounds: First, because it rebuts the presumption of malice in the defendant; and, second, because it enables the jury to determine what injury the plaintiff had sustained by the fault of the defendant.

* * * "The defamatory words imputed to her fornication and other grossly licentious conduct. The plaintiff must be presumed to have come into court prepared to meet any attack upon her character for chastity."

—— *vs.* ——, 22 Wisc., 372.

"The *quo animo* with which the words are spoken, or the article published, should, in a case where no special damage is alleged and proven, regulate the amount of damages; but whatever is calculated to show that the defendant acted in good faith, and with reasonable belief of the truth of the charge, and with good motives, should be permitted to go to the jury, who will give it the effect it should have."

Varnum *vs.* Townsend, 21 Fla., 447.

In Treat *vs.* Browning, 4 Conn. R., 409, the rule is thus well stated:

"It is equally indisputable that evidence which falls short of a justification may be competent to mitigate damages; and that the defendant, on the general issue, may prove, in mitigation of damages, such facts and circumstances as show a ground of suspicion not amounting to actual proof of the guilt of the plaintiff. So if any facts exist which tend to diminish the presumption of malice, they are competent proof."

And the same court, commenting on this case in Williams *vs.* Miner, 18 Conn., 477, says:

"Indeed, that a defendant ought in some way to be permitted to avail himself of such mitigating circumstances is not denied anywhere."

Odgers thus states the rule:

"It seems therefore that evidence of the plaintiff's *general* bad character may be given in mitigation of damages, but the defendant may not go into particulars. If, however, the plaintiff goes into the box, he can of course be cross-examined 'to credit' on all the details of his previous life; but unless such details are material to the issue, the defendant must take the plaintiff's answer and cannot call evidence to contradict it."

Odgers on Libel and Slander, Bigelow's Notes, Secs. 304, 305

Thus it appears that in actions of libel and slander very wide latitude is given defendant, under a plea of not guilty and in mitigation of damages, to prove that the character of the plaintiff is not so good as claimed by him. If material to the issues, specific acts of wrongdoing may be shown.

But this latitude was restricted by the learned trial justice; he would permit no inquiry into the good faith of the defendant in error in the very matter at issue, on his cross-examination, thereby at once violating a well-established rule of evidence in libel cases and unduly and injuriously restricting the right of cross-examination.

The greatest latitude is and should be allowed on cross-examination, especially of a party to the suit, for the purpose of sifting the conscience of the witness, touching his accuracy of statements, veracity, and credibility; and even specific, extraneous offenses and other matters material to the issues may be inquired into, if they have any bearing thereon.

The scope and purposes of cross-examination are thus

stated by the leading text-book writers on the rules of evidence:

"By means of it (cross-examination) the situation of the witness with respect to parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor and of determining the just weight and value of his testimony."

1 Greenleaf, section 446.

"While the party who produces a witness vouches for his credibility, the cross-examiner sustains no such relation to the witness. He is at liberty, and is often compelled, to attack the credibility of the witness, and for that purpose must be allowed wide latitude in asking questions which would otherwise be wholly irrelevant to the issue. For the purpose of testing the credibility of a witness, it is permissible to investigate the situation of the witness, with respect to the parties and to the subject of litigation, his interest, his motives, inclinations and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description. As incidental to this investigation, and within proper limits, the character, habits and mental condition of the witness may be investigated."

Jones on The Law of Evidence, vol. 3, sec. 826.

"Secondly, it has been much debated, whether a witness is bound to answer any question, the direct and immediate effect of answering which might be to degrade his character. On this subject the law still remains in a somewhat unsettled state, but this much would seem to be clear, viz: that where the transaction, to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct."

Taylor on Evidence, 8 ed., sec. 1459.

For the purpose of showing the character of the witness, and the degree of credit to be given his testimony, questions tending to show the present or recent places of residence, occupation, association and acquaintance of the witness of his own choice, are proper and cannot be considered as irrelevant.

Kirschner *vs.* The State, 9 Wisc., 137.

In an action for converting property into money for the purpose of placing it beyond the reach of creditors, the defendant testified, as a witness in his own behalf, that part of the proceeds "was put in the shape of promissory notes." On cross-examination he was asked what he did with these notes, but on objection the court refused to let the question be put. *Held,* error, the appeal court saying:

"Upon the issues involved, the defendants were entitled to a wide latitude in cross-examining the party charged with fraudulent conversion when testifying for himself."

Eames *vs.* Kaiser, *supra.*

Hitchcock *vs.* Moore, 70 Mich., 112, was an action of slander, the plaintiff having been wrongfully charged with burning defendant's barn. On cross-examination the plaintiff was asked if he had maltreated his wife, a daughter of defendant, by throwing her down and putting his foot upon her and otherwise treating her cruelly. The court say, p. 145:

"Without introducing any evidence his (plaintiff's) character and reputation stand without qualification or defect, and no evidence that he may offer can add to or increase its force and virtue."

"Nor can the fact that inquiries are made, on cross-examination, in relation to specific facts that may tend to weaken his good character and lessen his good reputation, change this rule. Such specific facts cannot be met, either as a part of the main case, or upon rebuttal, with evidence of general reputation in the community where he lives. If, upon such cross-examination, he admits the existence of such specific

facts, they must stand against him for what they are worth, except as they may be explained and qualified by evidence or explanation in his behalf."

Hay *vs.* Reid, 85 Mich., 307, was an action for libel brought by the marshal of a village against a newspaper. The court say:

"The plaintiff being offered as a witness, any cross-examination affecting the merits of the case was admissible, whether the particular transaction sought to be shown by such cross-examination had been referred to on his direct examination or not."

Even on the cross-examination of a witness not a party to the suit, testifying as to character, he may be asked if he has not heard of specific acts of the person whose character is in question inconsistent with that character.

"In the eye of the law the character of a person is to be ascertained by an inquiry as to what is generally said or thought of him in the community where he resides. Hence when a witness has testified in his examination-in-chief that the person, as to whose character the inquiry is instituted, bears a good character, his opinion and the value of it may be tested by asking the witness on cross-examination whether he has ever heard that the person, whose character is in question, has been accused of doing acts wholly inconsistent with the character that has been attributed to him. This, according to our experience, has always been allowed on a cross-examination without question."

State *vs.* Merriman, 34 S. C., 39.

The only limitation of the rule under discussion is aptly illustrated by the case of Kolb *vs.* Union R. R. Co., 23 R. I., 74. In this case counsel claimed that a witness may be interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer unless he claims his constitutional privilege.

On this point the court say:

"We agree that specific acts of misconduct committed by a party to the suit may be shown in that class of cases where the act has some relation to or some bearing upon the issue involved in the case, and also that the general reputation of the party as to the particular trait of character involved may also be shown."

This was an action on the case for negligence. In her examination-in-chief the plaintiff, testifying in her own behalf, said that she had three children by a first husband, and three by the second, who was killed by the alleged negligent act of defendant. On cross-examination she was required to admit that she had given birth to an illegitimate child more than 21 months after her husband's death. *Held*, error, as having no relation to the issues involved.

The exception under consideration involves two questions material to the issues raised by the pleadings:

1. The volume and quality of character.

2. The volume and quality of malice.

Both go to mitigation.

A character x may be valued at a.

A character x-y may be valued at b.

The fact that an effort to prove y may tend to prove the truth of the libel does not justify its denial. The court below disregarded this rule by distinctly placing its refusal to permit the proposed inquiry upon the ground that it was an effort to prove the truth of the libel without pleading it. But this court-made rule of evidence does not purport to extend to a case where the fact offered to be proved did not, *ipso facto*, constitute a full justification, if pleaded; but only to such as might have been pleaded in justification.

The opinion of the Court of Appeals objects that counsel by their offer pointed to no particular matter it was proposed to inquire of. This concedes the rule as above stated, and

falls back upon the proposition that no case for its application was made by the offer of counsel. In this the court plainly overlooked the terms of the offer, which was to go into the inquiry whether, before making his presentment of the plaintiff in error, the defendant in error knew the sole prosecuting witness or investigated his character. It must be assumed that he did not, and this reckless disregard of the rights of others constituted the *y* of the suggested equation.

The materiality of this is manifest. If the defendant in error, vested with the power of destroying the character of his fellow citizens, undertook so to do upon the unsupported statements of a perfect stranger, into whose character he made no inquiry before using that power against plaintiffs in error, he manifested in himself a character so far below the standard as to make the injury to him proportionately less than would be the injury to a man whose character is normal.

In this connection should be considered the testimony of Pickford (R., p. 29) that the defendant in error's predecessor in office, Mr. Kilgour, had told him that the indictment was a blackmailing scheme, and depended on the testimony of Hudson alone, and the testimony of Mr. Kilgour that in all probability he did use the word "blackmailing" in his conversation with Pickford, and the further facts, admitted by the defendant in error, that Hudson was the only witness he called before the grand jury, and that he did not inquire about the matter of prosecuting plaintiffs in error of his predecessor, Mr. Kilgour, to whom Hudson had told his tale shortly after the fire. This was two years and four months before the defendant in error qualified as State's attorney.

All this taken together, shows a readiness on the part of the defendant in error to smirch the character of plaintiffs in error amounting to recklessness, such that if the defendant in error were at the bar for his conduct in the premises it would be held to show malice of the degree calling for punitive damages.

If this does not tend to mitigate damages on the score both of the bad character of the defendant in error and bad faith on his part—in respect of each of which the rejected offer was made—it is difficult, and indeed impossible, to conceive anything that should have that effect. Its exclusion practically precluded the plaintiffs in error from making any defense, even by way of mitigating damages, because they could not make a full defense to the whole cause of action under a plea of justification. If the rule of evidence invoked by the learned trial justice must carry with it such gross hardship and injustice, it should be entirely repudiated, as clearly in conflict with the principles of the common law, and subversive of justice.

In many of the later cases the rule has been modified to the extent that matter tending to mitigate damages, even though, at the same time, bearing in the direction of testimony tending to prove the truth of the libel, might be admitted as mitigating damages upon both the grounds above indicated, namely, first, as derogating from the character of the plaintiff, and, second, as reducing the malice involved in publishing the libel. Had the testimony here excluded been admitted, it would have been a fair and forcible argument to make to the jury both that the defendant in error, being a man so reckless of regard for his duty and the rights of others, had not the character entitling him to the solace for its injury, which a man of normal character might demand, and also that the plaintiffs in error, smarting under the infliction of an injury growing out of such recklessness, could not be held guilty of the extent of malice to be imputed to one without any such instigation publishing a libel against another.

And, as respects the criticism of counsel for not directing the attention of the trial court to a specific matter or particular facts, it is submitted, first, that the specific matter just considered was called to the attention of the trial court as one into which it was desired to go, and secondly, that,

on the authority of Scotland County *vs.* Hill, 112 U. S., 183, where counsel is free from the imputation of bad faith and the court, at the threshold, cuts off inquiry along a proposed *line*, it is unnecessary either to produce witnesses to depose to the desired matter or to state it more definitely than is sufficient to inform the court of the character of the proposed inquiry. In such case "an appellate court must assume that the proof could have been made and govern itself accordingly."

The trial court was seemingly frightened by the bogey arising from the rule laid down in Underwood *vs.* Parkes, 2 Strange, 1200, that "the truth of words cannot be given in evidence on not guilty."

The interpretation of this rule and the extent of its application have given rise to the greatest possible diversity in the judgments of the courts, at least in those States where it has not been abolished by statute. It was first promulgated in 1827.

Commenting on this case, Judge Selden says in Bush *vs.* Prosser, 11 N. Y., 362:

"The courts have implicitly followed that case, without even seeming to consider that the rule it laid down was not only a departure from the principles of the common law, and a pure piece of judicial legislation, but that, in its consequences, it must necessarily deprive defendants of all power to mitigate the verdict. Prior to that case, defendants in this class of actions were permitted to prove not only the absence of malice, but *the truth of the charge itself* in mitigation. This is shown in the case of Smithies *vs.* Harrison (1 Lord Ray., 727). The reception of this evidence was in perfect accordance with the general principles of the law."

See also Van Derveer *vs.* Sutphin, 5 Ohio St., 302.

"The English courts, and most of those in this country, have admitted the authority of the rule laid down in this case (Underwood *vs.* Parks), and professed to follow it, though with the greatest possible diversity in its interpretation, and the extent of its application. The defendant, of

course, has not been allowed to plead these mitigating circumstances, because they do not constitute a justification or complete defense; and in some of the English and many of the American cases, when he has undertaken to introduce them under the general issue in mitigation, he has been told that they are inadmissible under the rule in Underwood *vs.* Parks, because he has not insisted upon the truth of the words by a plea or notice of justification. If, on the other hand, he has put in such a plea or notice, and failed to sustain it by the proof; then under another rule of a most arbitrary and anomalous character (which has fortunately been abolished in this State and many of the other States by statute), his plea or notice was held to be a repetition of the slander in the most solemn form, conclusive evidence of malice and an aggravation of damages."

Huson *vs.* Dale, 19 Mich., 29, 30.

For instance, the plaintiffs in error under a plea of justification, might have proved that Talbott, while State's attorney for Montgomery county, "conferred with the unsavory Hudson at Rockville"; that "Hopp and Hudson were seen riding out of town in a buggy"; that Talbott "would also be paid" by the insurance companies for procuring a conviction under the indictment; that "Talbott procured a bondsman for him" (Hudson); that he was holding on to a "pension witness" to "keep him up to the sticking point"; that the "insurance companies' death grip on the district attorney to secure the return of money justly paid out is as evident as the treacherous character of the testimony he relied upon to destroy the reputation of honorable men and blast forever characters which in this community stand unimpeached"—and yet have failed to prove the remaining charge of the alleged libelous article, that the district attorney "comes out of this affair shorn of even the excuse of over-zealousness"; and with what result? Not being a full justification, the plea must have been "held to be a repetition of the slander in the most solemn form, conclusive evidence of malice and an aggravation of damages."

If these rules are strictly enforced, defendants in libel

actions are practically precluded from making any defense; for according to the rule laid down in Underwood *vs.* Parks, no part of the libelous article can be shown to be true under the general issue, and under the other rule nothing can be more hazardous than to plead that an alleged libel is true without being able to prove the truth of every word of it. Wherefore one or the other, or both, of these anomalous rules should be modified in the interest of a due and proper administration of justice, in the same way they were established—that is, by "judicial legislation," as so aptly expressed by Selden, J., in Bush *vs.* Prosser, *supra*.

The result of the authorities is that while in impeaching the character of a witness the inquiry is, in general, limited to his general reputation, yet where the feature or trait of character sought to be inquired into touches, or is involved in, any issue in the case, such feature or trait may properly be gone into, especially where the witness is a party and the feature or trait in question is directly pertinent to the gravamen of the action or the peculiar ground of damage alleged.

In a case of libel involving the character of the plaintiff, any matter tending to show that his character is of a sort not susceptible to damage is clearly pertinent: and how much more pertinent is an inquiry tending to show that in respect of a particular character, as that of probity in office, the plaintiff lacks it: and that he lacks it is, as of course, better shown by proof of specific acts of dishonor, brought directly home, than by proof of the general estimation in which he may be held by those ignorant of such acts. In the case at bar the interrupted attempt was to show that the defendant in error, by reason of his conduct in the very matter in controversy, was not entitled to and did not have the peculiar character in respect of which he claimed to have been injured, namely, a character for probity in office: and the refusal to permit this matter to be gone into on cross-examination worked injury to the plaintiffs in error so manifest as of itself to call for a reversal of the judgment.

II.

The Trial Court Erred in Respect of Instructing the Jury as to the Responsibility of the Plaintiffs in Error for the Alleged Libel.

The testimony on this point was as follows:

Elliott said the plaintiffs in error came to his office and stated their case. He objected that it was stale. Judge Mackey had made some statements preliminary to the visit; said that the article would create an excitement. Elliott objected that the matter of it was libelous. The plaintiffs in error he thought, guaranteed him that if anything should happen they would see him through. Mackey brought him the manuscript of the article, blocked out in the rough, with a synopsis of the facts in it, or an epitome of the case. It might be that Mackey brought the article to him; he remembered that it was signed by Mackey. He did not publish it as Mackey had written it; he remembered telling him that he would rewrite it or elaborate it. After the article was published he might have told Mackey that he "had put into the article a lot of hot stuff so as to make it readable, and call the attention of the readers of the paper to it" (R., pp. 20, 21). Mackey "furnished the epitome written, and then his talk added to the epitome and I reproduced his talk, and from that made the original article" (R., p. 21). He printed a second article a week after the first, but changed it very much. His testimony left it uncertain whether the plaintiffs in error were connected with the distribution of the first or second article, or both (R., p. 21 *et seq.*).

Mackey was clear that the article in controversy was of his own conception and composition; that it was his article; that the plaintiffs in error did not request him to write it, that they had no say in it, and never saw it in its entirety, and that it was not published as he wrote it (R., pp. 26, 27).

The testimony of the plaintiffs in error was in harmony with that of Mackey. Walter heard Mackey read something which he said he was going to publish in the papers (R., p. 32), and Mackey read a part of the article to Pickford, but not as it appeared in the *Globe;* Pickford could not recognize the article in the paper as Mackey's (R., p. 29). Neither Pickford nor Walter had anything to do with distributing the first article. They did agree to take copies of the second article and did so and handed them around (R., p. 29 *et seq.*).

The first prayer of the plaintiffs in error is as follows:

"The jury is instructed that this action is based exclusively upon the article printed in the issue of the newspaper known as *The Sunday Morning Globe*, of December 8, 1901, and that, in order to entitle the plaintiff to recover, the jury must find that the exact language of that article, *or such part thereof* as the jury *under the instructions of the court* shall find to be libelous *and as are set forth in the declaration*, was or were written, or authorized to be written, or published, or authorized to be published, by the defendants, or one of them, and its verdict in any case can be against only such one, if either, of the defendants as is shown by the evidence so to have written or published, or authorized the writing or publishing of the same. And, in considering whether the defendants, or either of them, authorized the publishing of the said article, or any *such* part thereof, as set forth in the declaration, it will not be sufficient to find from the evidence only that the defendants, or either of them, had knowledge, in advance of the publication of the said article, that it was to be published and expected its publication; the jury must find from the evidence that the defendants, or one of them, authorized, directed or participated in the publication" (R., p. 36).

The court refused this prayer and instructed the jury as follows:

"*This article* on the face of it, as a matter of law, is libelous, and its meaning libeled this plaintiff. * * * There are two theories upon which the plaintiff submits to you the proposition that the defendants have libeled him. The first

is predicated upon the testimony of Mr. Elliott, who gave testimony tending to show that the defendants procured him to publish this article *after they knew what was in it*, about the plaintiff. * * * *Inasmuch as this article is on its face a libel*, if the defendants or either of them secured copies of the paper after it was published and themselves put it in circulation after it was published, then they would be responsible for it the same as if they had written it themselves. But if not, then they would not be responsible at all, for this libel, unless it be upon the other theory the plaintiff submits, which is as follows: That although they did not write the article themselves, that although the jury may find they did not go to Elliott's and get Elliott to print the article, that nevertheless they procured Judge Mackey to write the article and that they are responsible for it on that account. * * * If you find he was their agent in that regard, then they are responsible for what he wrote upon this subject, to the extent that they authorized him to write. If he was their agent for the purpose of writing the article, it is not necessary that they shall have said to him, in order to be responsible for his language, 'Write this, that, and the other thing;' *in so many words*. But it is necessary that they either directly or *by implication* authorized him to write, under such a general authority as fairly carried with it the authority to express on their behalf what the article contains. If so, they would be responsible for what he wrote in that regard. Otherwise, not.

"There, however, you have to make another inquiry, as follows: Even if you find that they did authorize Mackey to carry to Elliott for publication an article, they are not yet responsible for this article unless you find this is the article they fairly authorized him to carry. * * * If you find that in either of the aspects under which the case goes to you the defendants are responsible for *so much of this article* as injures the good name of Talbott as an officer and a lawyer, then *inasmuch as the article on its face is a libel*, if they are responsible for that part of it that libels Talbott, because they either directly or *by implication occasioned* the publication of it, then the plaintiff has proved a right to recover" (R., pp. 38-40).

In slander the words must be proved as laid, and it is not sufficient to prove equivalent words. Words to the same effect are not the same words.

The plaintiff need not prove all the words on the record, but he must prove so much of them as will be sufficient to sustain his cause of action.

The words in which the slander is conveyed must be stated in the declaration and substantially proved.

Fox *vs.* Vanderbeck, 5 Cow., 513.

In slander, though the words proved are equivalent to the words charged in the declaration; yet, not being the same in substance, an action cannot be maintained; and, though the same idea is conveyed in the words charged and those proved, yet if they are not substantially the *same words*, though they contain substantially the same charge, but in different phraseology, the plaintiff is not entitled to recover

Olmstead *vs.* Miller, 1 Wend., 506.

"If the plaintiff sets forth the words, he is bound to prove them as laid. Things immaterial in themselves are often made material by a special allegation. And, although the ancient strictness in this respect is exploded, yet it is now a settled and reasonable rule in pleading that the *allegata* and *probata* must agree, and that the *material and actionable words* must be proved as stated, and cannot be supplied by proof of equivalent words."

Whiting *vs.* Smith, 13 Pick., 364, 371, which was an action of slander.

In an action of slander, a variance between the words charged in the declaration and the words proved is fatal.

Stanfield *vs.* Boyer, 6 H. & J., 248.

Slight variances between the words charged and the words contained in a libel will prove fatal.

Winter *vs.* Donovan, 8 Gill., 370, 376.

To maintain an action for slander, the substance of the alleged charge must be proved in substantially *the same words* laid in the declaration. Any mere variation in the

form of expression only is not material, but *the words* alleged cannot be proved by showing that the defendant expressed the same meaning in different words. It is not necessary, however, to prove all the words laid, unless the omission of those not proved would so vary the meaning of the others as to make the charge as proved a different one from that alleged.

Smith *vs.* Hollister, 32 Vt., 695.

To warrant a conviction for slander it is essential that the slanderous language charged must be proved as charged, and proof of words of precisely the same meaning as those alleged in the indictment will not suffice.

"The prosecution need not prove all the words laid, but it must prove enough of them to establish the slander charged."

Barnett *vs.* State, 31 Tex. Crim. Rep., 280;
Contee *vs.* State, 14 Tex. Crim. App., 222;
Fresley *vs.* State, 26 Tex. App., 180;
Riddle *vs.* State, 43 Tex. App., 425.

In case of a written or printed libel, the proof must agree with the indictment in every particular essential to the identity, such as dates, names, and the *precise words used*, and a variance is fatal.

State *vs.* Fitzgerald, 20 Mo. App., 408.

And an instruction which leaves it to the jury to determine whether the defendant "in substance" spoke or published the words charged without explaining the meaning the law attaches to those words in such connection is erroneous.

Atteberry *vs.* Powell, 29 Mo., 429.

The words testified to are not the same words, nor substantially *the same words*, laid in the complaint, but are of the same import, or at least such that the jury might so find them, will not sustain the action, because *the words laid* must be proved in substance; and different words, although

imputing the same charge, but entirely different language, will not support the complaint.

Enos *vs.* Enos, 135 N. Y., 165; 32 N. E. Rep., 123.

An instruction that the substance of the alleged slanderous words is all that the plaintiff must prove is erroneous and misleading.

"The rule is, not that the substance of the words alleged must be proved, but that the words alleged in the declaration, or enough of them to amount to a charge of a particular offense alleged to have been imputed, must be substantially proved. Although the words proved are equivalent to the words charged, or have the same meaning, or amount to a charge of precisely the same offense, yet not being the same words, or substantially *the same words*, the action cannot be maintained."

Ranson *vs.* McCurley, 140 Ill., 626; 31 N. E. Rep., 119, 121.

A declaration alleged that the defendants published, or caused to be published, in a certain pamphlet a libel concerning the plaintiff. From the evidence it appeared that the defendants were instrumental in procuring the vote of a medical society expelling the plaintiff therefrom for gross immorality. The vote was published among the transactions of the society by the regular committee of publication, of which the defendants were not members. *Held*, that the allegation in the declaration was not supported.

Barrows *vs.* Carpenter, 11 Cush., 456.

An instruction that defendant is liable for the libel in the form in which it appeared if he furnished any part of the materials used, or in any way aided or was concerned in its production, is erroneous, as is one which assumes that furnishing some of the materials used would constitute a publication when the libel as a whole was very different from the material so furnished.

Howland *vs.* Blake Mfg. Co., 156 Mass., 543; 31 N. E. Rep., 656.

The effect of the authorities is that, in strictness the words laid in the declaration must be proved as laid, any variation, even slight, being fatal; though in some jurisdictions it is sufficient to prove substantially *the words* laid, as distinguished from the substance of the *charge;* and while all the words as laid need not be proved, yet it is necessary that enough of them must be proved to constitute a libel *as defined by the court.* It is never proper to leave to the jury the double question whether any, and, if so, what, words were spoken or written, and whether, if spoken or written, such words constitute a libel.

In refusing the prayer under consideration and charging the jury as above set forth, the court went counter to both branches of the rule thus established.

In the first place, the authorities show that even as against the author or publisher of a libel the greatest strictness of proof is demanded as to the words uttered; and how much more applicable is this principle to the case of one who is sought to be held liable as the instigator or inspirer only of a libel. The court told the jury that, considering the case from the viewpoint of liability for instigating or authorizing a libel, it is not necessary to find a defendant guilty of having authorized or directed the words used, but that it is sufficient if the defendant under "a general authority" authorized the writer of the libel to express what the article contains; in other words, that if the defendant in general terms authorized a libel, he can be held liable for the words used by the writer, even though those words be specially laid in the declaration and yet not proved.

And, in the next place, the court may not leave it to the jury to determine whether given words are libelous in law. While all of the words laid need not be proved, yet some of them,—some "set" of them, as the expression of some of the authorities is,—sufficient in themselves to constitute a libel, must be proved; by which is meant sufficient to constitute a

libel *as defined by the court*. There is no authority, and no principle, justifying the leaving to the jury the determination of the question whether given words, or a given "set" of words, constitute a libel, which is a question of law.

By its action in this case the court first told the jury that it need only find that the plaintiffs in error authorized the substance of the charge, in whatever words to be expressed, and, next, that if it found that such or some of the words used by the writer of them as the plaintiffs in error "*by implication occasioned*" to be published were libelous, the plaintiffs in error were responsible.

By saying to the jury "this article *on the face of it*, as a matter of law, is libelous, and *its meaning* libeled the plaintiff" (R., p. 38, fol. 72); "this article is *on its face* a libel" (R., p. 38, fol. 73); "if you find that * * * the defendants are responsible for *so much* of this article as injures the good name of Talbott as an officer and a lawyer, then inasmuch as the article *on its face* is a libel, if they are responsible for *that part* of it that libels Talbott, because they either directly or *by implication occasioned* the publication of it, then the plaintiff has proved a right to recover" (R., p. 40, fol. 76), the court left to the jury the single, naked question whether the plaintiffs in error *occasioned*, even by implication, the publication of any part of the article, any part of "what the article contains" (R., p. 39, fol. 75).

As is seen, the point of the exception under discussion is that, as the declaration counts upon the procurement by the plaintiffs in error of a publication of a libel specifically set forth, the proof must correspond to the allegation and the identical libel must be shown to have been authorized by the plaintiffs in error.

On the hearing in the Court of Appeals an interrogation from the court on this point was whether a person going to the publisher of a newspaper and authorizing him to publish a libel concerning another is not liable for whatever the publisher sees fit to print; to which the answer was then, and is

now, that such person is undoubtedly liable, but must be charged specially with the thing which he did, namely, procure the publication of a libel of a given character and import. Thus, in the case at bar, had the declaration alleged that the plaintiffs in error, seeking to injure the appellee, had laid before the publisher a statement of their supposed grievances and authorized the publication of a libel of a given import and along certain lines, and followed this by saying that, in pursuance of such application and authorization on the part of the plaintiffs in error, the publisher had published the libel described, this would have sufficed to hold the plaintiffs in error liable, provided that the jury should find that the publication was in general accord with their instruction and authority. But where, as here, the pleader has elected to declare that the plaintiffs in error caused and procured the publication of the specific libel set forth, "*in totidem verbis*," the law holds the pleader to proof of the libel as laid. In its opinion, it is respectfully submitted that the Court of Appeals omitted, altogether, any consideration of this distinction and merely set forth the rejected instruction and the general charge of the court below, saying that the charge clearly and fairly stated the law applicable to the several phases of the evidence and that it embodied all that was contained in the refused instruction. That the court was in error is respectfully, but most earnestly, insisted. The rejected instruction asked the trial court to hold the defendant in error to proof of the libel as laid, while that court told the jury, in effect, that it was not necessary for him to prove the libel as laid, but that it would be sufficient for him to prove that the plaintiffs in error authorized it in substance. This ignored the vital point upon which the exception under consideration turns, namely, that a recognized rule of good pleading and of the production of testimony to conform to such pleading was not considered by the trial court, or, if considered, was entirely disregarded, and the Court of Appeals, in its opinion, passes the point in silence.

The error thus apparent so clearly goes to the foundation of the action as against the plaintiffs in error, and so plainly shows the entire absence of a right in the defendant in error on which to rest the judgment, that it would shock the sense of justice to permit the judgment to stand; so much so that, even in the absence of apt exception, the court should reverse the judgment.

"The court are of opinion, and it has been heretofore decided, that where the objection goes to the foundation of the action and shows the entire absence of a right in the party on which to rest the judgment, it will not be deemed to have been waived, by an omission specially to point it out in the assignment of errors."

Wetmore *vs.* Woodhouse, 10 Tex., 33.

"Yet, on the other, where it is evident the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded on an error, I apprehend this court could not feel itself authorized to decline its revision, if necessary to attain the law and right of the case, though there was no complaint of the charge at the time and though the assignment of error was general, upon the principle either that the error was too apparent and palpable to escape observation, or that where the objection goes to the foundation of the action, or to the very right and justice of the decision on the merits, the court will consider it, though not especially assigned as error (10 Tex., 33; 1 *id.*, 572); for where the decision is manifestly against right, or contrary to law, as has been said, it would shock the sense of justice to permit the judgment to stand."

Hollingsworth *vs.* Holshousen, 17 Tex., 47, 48.

"On the supposition that there was error in the charge of the court, appellee contended that appellant has not placed himself in position to take advantage of it because objection was not made to the charge at the time it was given. * * *

"Appellee refers to numerous decisions of the court as sustaining his position that appellants having failed to object to the charge at the time it was given, it cannot now be made a ground to reverse the cause.

"This has been the general practice of the court where the

general charge is unexceptionable. But when the verdict of the jury has been made to turn upon an erroneous charge and the judgment upon the merits is thus founded on error, the judgment will be reversed, though the charge was not complained of at the time, as in Hollingsworth *vs.* Holshousen, 17 Tex., 47; Wetmore *vs.* Woodhouse, 10 Tex., 33."

Beazley *vs.* Denson, 40 Tex., 416.

The serious harm done the plaintiffs in error by refusing the instruction under consideration is manifest from the merest glance at the testimony. Elliott, who published the alleged libel, said that Mackey furnished the epitome written, and then his talk added to the epitome, and he, Elliott, reproduced his talk and from that made the original article (R., p. 21); while Mackey, who wrote the original article from which the alleged libel was thus prepared, said:

"After the article was partly written, I met Mr. Pickford on the street and told him I would like to read the article to Walter and himself; they had no say in the matter at all and never saw the finished article. * * * Everything that imputes criminality to Mr. Talbott is not mine. The clause beginning 'the insurance company's death grip on the district attorney to secure the return of the money justly paid out is as evident as the treacherous character of the testimony he relied upon to destroy the reputation of honorable men and blast forever their characters, which in this community stand unimpeached and are unimpeachable by even a Maryland district attorney'; none of that is mine. The plan of my article was to show that there was a conspiracy in this city and that Mr. Talbott was victimized. I complained to the editor because he had changed my article" (R., p. 27).

And the testimony of each of the plaintiffs in error shows that neither authorized the article in the form in which it was published, and that neither saw it before publication. On this point Elliott, on being recalled after the noon recess, when, as he said, he "went over the whole thing *retrospectively*," testified: "I sent the proof of the article that Judge

Mackey brought and that I remodeled to Mr. Pickford" (R., p. 26), but could not remember by whom it was sent, nor did he say or pretend that Pickford read the proof or saw or approved of the article before it was published. The article with which Pickford and Walter had to do was the one written by the witness Bradshaw and published after the alleged libel (R., pp. 29-32); but, as above stated, the second article is not complained of and is not mentioned in the declaration.

HENRY E. DAVIS,
SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

THOMAS H. PICKFORD AND JOHN H. WALTER,
Plaintiffs in Error,
vs.
HENRY M. TALBOTT.

BRIEF OF HENRY M. TALBOTT, DEFENDANT IN ERROR.

The case is here on a writ of error to the Court of Appeals of the District of Columbia, and is best stated by the following from the opinion of that Court (Rec., 44):

> This is an appeal from a judgment for $8,500 recovered by the plaintiff in an action for libel.
>
> The declaration of the plaintiff, Henry M. Talbott, is in three counts. The first, alleged, that on and before December 7, 1901, plaintiff was State's attorney for Montgomery County, in the State of Maryland, and had been elected to said office by the votes of said county. That as such officer it was his duty to conduct the prosecution of all persons accused of crimes committed in said county, before the grand and petit juries thereof. That well knowing plaintiff's good name and reputation as such officer, and with the intent to deprive him of the same, and bring him into scandal and dis-

repute among his neighbors and other citizens of Maryland, the defendants, Thomas H. Pickford and John H. Walter, on December 7, 1901, composed and published a libel concerning the plaintiff. The count set out certain parts of the publication. The second and third counts, in addition to the allegations of plaintiff's public position as aforesaid, alleged that he was a lawyer in good standing in the said county where he lived, and that the publication of the libel was made maliciously to destroy his good name and reputation both as a lawyer and as officer aforesaid. The alleged libelous article was alleged to have been printed in a newspaper published in the District of Columbia, and circulated therein and in Maryland, called the Sunday Globe. It was set out in full in both counts. It is unnecessary to repeat it here, because it is not denied that it is libelous *per se*, and no exception was taken to the charge of the court wherein it was so characterized. It is sufficient to say that it purported to be a vindication of defendants and others who had been indicted in Montgomery County, Maryland, for the crime of arson, while plaintiff was State's attorney for said county, and accused him of combining with persons called "blackmailers," to procure a false indictment, and of otherwise acting improperly in the prosecution until compelled to dismiss the same, etc.

The defendants pleaded not guilty to each count.

I.

The first assignment of error is based on the refusal of the *nisi prius* court to permit a further cross-examination by plaintiffs in error of the plaintiff below, Mr. Talbott, who was called in his own behalf, under the following circumstances (Rec., p. 44-45):

Talbott testified on cross-examination:

> My attention was first called to the matter by an old

gentleman here in Washington, named Thompson, in a vague and indefinite letter, and Thompson stated in it that he would like to confer with me on the subject. I did not go at once to see Thompson, but shortly afterwards received another letter, in which he stated the crime was one of arson. I do not know where those letters are nor do I know whether or not the matter had been brought to the attention of my predecessor in office. It occurred during his incumbency. I did not inquire about it from my predecessor, Mr. Kilgour (30). I do not know whether or not I asked Thompson if the matter had been brought to the attention of Mr. Kilgour (31).

Thompson was a newspaper man. I had never seen him before calling in response to his letter (32). He told me that Hudson would be a witness, but did not tell me who Hudson was; but that he was thoroughly in touch with the situation. Subsequently Thompson and I went to see Hudson. I took a stenographer with me (33). They were both strangers to me.

Thereupon the court, of its own motion, interrupted the cross-examination and the following occurred:

The Court: On what line are you pursuing this inquiry?

Mr. Maddox: I am going to show, if I can, the absence of good faith in this indictment on the part of the District Attorney.

Thereupon, after discussion and explanation on the part of counsel for the defendants, the following occurred:

The Court: I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth without pleading it. * * * You may prove anything Pickford heard the witness say, before the article was published.

Mr. Maddox: I want to prove by this witness first by his own testimony in connection with the transaction complained of in this article that he is not a man of good character, which he says he is.

Mr. Lipscomb: I do not object to your asking him

that Mr. Maddox.

Secondly, I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy.

The Court: You may prove anything Pickford heard the witness say before the article was published.

Mr. Maddox: I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury and whether he investigated the character of the man.

Under your statement that you propose by that line of testimony to prove that the District Attorney acted in bad faith, I will not hear it, because I do not think it is revelant for that purpose.

To which ruling of the court the defendants, by their counsel, then and there duly excepted and prayed the court to note the same upon the minutes, which was accordingly done.

This is the only exception to the action of the trial justice in ruling on admission or exclusion of evidence.

In support of this action it is submitted that:

A. The line of interrogatory was not true cross-examination because not responsive to the direct examination.

B. It was obviously useless because the court cannot suppose that the defendant in error would have admitted that he had acted in bad faith in submitting the matter to the grand jury and preparing an indictment upon their presentment so that no harm to plaintiffs in error ensued although palpable injury to defendant in error did result because he was thereby precluded from giving his version of the finding of the indictment.

C. Upon familiar principles the court cannot deal with the supposed error because there is nothing in the Record in the nature of an offer to prove any definite fact by the witness, so that the court cannot tell what the effect of the ruling was except that it can be plainly seen that it was more injurious to defendant in error than to plaintiffs in error.

This clearly appears by Mr. Lipscomb's statement in the Record that he was willing the so-called cross-examination should proceed on the lines indicated.

D. It was a clear attempt to prove by cross-examination and in advance a part of the defendant's case in chief.

It is well settled that this cannot be done over objection, either by the court or by counsel.

> Jones on Evidence, Sec. 820, 821 and 837.
> Philadelphia Railway Company *vs.* Stimpson, 14th Peters, 461.
> Northern Pacific Railway Company *vs.* Urlin, 158 U. S., 271.

The "English rule" allowed practically a cross-examination of a witness on the whole case, but it is by the "American rule" equally well settled in a large majority of States and all the Federal courts that it is limited to matters brought out by the direct. Says this court:

> The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the cause.
>
> Hough *vs.* Jones, 1 Wall.
> Phila. R. R. Co. *vs.* Stimpson, 14 Peters.

The record shows no plain direct question was asked by the floundering cross-examination, except that counsel said he wanted to prove by Talbott himself that Talbott was not a man of good character.

Considering the fact that the record shows that no evidence whatever was introduced by the plaintiff in error to show Talbott's reputation to be bad, it can hardly be believed that counsel expected Talbott himself to say his own character was bad, and that he acted in bad faith.

In its opinion the Court of Appeals says of this incident (R., p. 49):

> "The court was apparently correct in his understanding of the proposed line of inquiry; but if mistaken, it was the duty of counsel to correct his misapprehension by a specific statement of the questions they desired to ask, or of the particular facts they proposed to inquire of."

Says this court in Phil. R. R. Co. *vs.* Stimpson, 14 Pet., 448:

> "It is incumbent on those who seek to show that the examination of a witness has been improperly rejected to establish their right to have the evidence admitted, for the court will be presumed to have acted correctly until the contrary is established."

After Mr. Talbott left the stand and his case was closed, full opportunity was given the plaintiff in error to attack his reputation by witnesses, but none was produced.

On direct examination the plaintiff in error testified (R., p. 59):

> "We investigated the rumor that Mr. Talbott had released a man accused of murder for money while we

were having Mr. Talbott looked up after the court proceedings. I do not remember the name of the murder case."

On further cross-examination, the following occurred:

By Mr. MITCHELL:

Q. Mr. Pickford, you have stated that you had gone into Maryland and found out that Mr. Talbott had released a man who was accused of murder—*nolle prossed* his case for money. A. I did not say that.

Q. What did you say in regard to that? A. I say I heard something in reference to that, and I sent out to have it investigated, and that there was a part of that in the paper.

Q. Who told you that? You say you heard it? A. That was common talk out in the town.

Q. Common talk among whom? A. Mr. Bradshaw told me for one.

Q. Who else? A. I don't know who else. I cannot recall the name.

Q. Then it could not have been such common talk? A. Yes, it was.

Q. Can you name any other citizen of Washington, or of Montgomery County, who told you that Mr. Maurice Talbott had *nolle prossed* a case for money, of a man charged with murder in Maryland? A. I say we investigated that, and part of the case.

Q. Answer the question please.

Mr. MADDOX: Let us see. He says he investigated it.

By Mr. MITCHELL:

Q. I do not care about that. Can you name a single individual in the city of Washington, or in Montgomery County, who told you, besides Mr. Bradshaw, that Mr. Talbott had *nolle prossed* a case of a man charged with murder, for money? A. I do not know of any, no. That was a part of it that we looked up.

Q. Who do you mean by "we"? A. I do not mean anybody but me. I mean myself.

This villainous attack on Mr. Talbott's character in open court is thus shown to rest solely on the statement of one Aaron Bradshaw, jointly indicted with Pickford, whose other malicious and reckless statements are fully exposed in the record.

E. It was also plainly an attempt to prove justification without pleading it, and this as the Record discloses, was the controlling reason for the *sua sponte* ruling by the court.

Justification cannot be proved in this jurisdiction unless specially pleaded, and here the only plea was the general issue. The doctrine on this subject is stated by Mr. Newell in his work on Libel and Slander, Secs. 68 to 76 and the notes thereto.

The doctrine briefly stated and established beyond any peradventure is that "the truth" or "justification" must be specially pleaded and with sufficient precision and particularly to enable the plaintiff to know precisely what is the charge he is to meet.

Richardson *vs.* State, 66th Md., 205.
Smith *vs.* Tribune, 22d Fed., 13 and 118.
Woodruff *vs.* Richardson, 20 Conn., 238.
Knight *vs.* Foster, 39 N. H., 576.
Smith *vs.* Blanchard, 42 N. H., 137.

F. The scope and extent of the cross-examination like the order of proof are within the sound judicial discretion of the trial court, and such rulings will not be disturbed unless they clearly amount to an abuse of that discretion.

G. The bad character either generally or in the office as State's attorney of defendant in error may be shown, but

such showing should be made by, and only by independent proof, as part of defendant's case. Such proof was not offered and at the argument counsel for appellants admitted that it *could not be obtained*. This admission sustains the contention already made that the so-called examination would have been not only useless but injurious to appellants.

This court has aptly said that the trial judge is something more than the moderator of a town meeting and that he has affirmative duties to perform in ruling upon questions of evidence.

Patton *vs.* Texas & Pacific Ry., 179 U. S., 658 and 660.

No controlling authority in support of the first assignment of error is cited by plaintiffs in error who rely on State cases, holding that by independent proof plaintiff's character can be attacked. The cases cited, except one, do not deal with cross-examination in this aspect and the passage cited from the exceptional case is clear dictum, and in a totally different class of case from the case at bar.

The record shows (p. 33) that Hudson was called as a witness for the plaintiff Talbott and that he contradicted point blank the witness Bradshaw, as follows: "*I never was in Kilgour's office and never ordered out of his presence. I never saw him but once. I was a witness before the grand jury in Montgomery County and the only witness when the indictment was found for arson in burning the house at Four Corners.*"

The defendants, Pickford and Walter, had then their chance to impeach him if he was "an irresponsible person" and unworthy of credit, but they made no effort so to do, and he was left unassailed before the listening petit jury.

They, therefore, properly presumed him of good repute, and Talbott and the grand jury of Montgomery County had also a right to trust and believe him.

Hudson was the sole witness on whose word the indictment for the grave crime of arson rested. He was turned over for the probe of cross-examination to the counsel for the men he had sworn committed this crime.

If he was a blackmailer, perjurer and man of unsavory reputation, they must have known it, and cross-examination might have broken him down. If he was, on the other hand, the holder of their guilty secret and told it to Talbott and the grand jury, they also knew that, and it was wisdom to let him alone. They asked him nothing and the petit jury saw it.

How, then, could they have expected to prove from Talbott's cross-examination that Hudson was a rascal when they did not attempt to prove it when Hudson himself faced them? They were not limited in the cross-examination of Hudson.

They did not ask him what Thompson, the newspaper man, told him.

They did not ask Talbott what Hudson told him (Talbott) in the presence of Thompson and the stenographer, and they did not call the stenographer who took Hudson's statement at Talbott's request.

They were not denied the right to impeach by witnesses the characters of Talbott or Hudson, and they offered no testimony in that line.

It is therefore submitted that there was no error in the ruling complained of by the first assignment.

II.

The second assignment complains of the rejection of appellants' first prayer.

> 1. The jury is instructed that this action is based solely upon the article printed in the issue of the newspaper known as the Sunday Morning Globe, of December 8, 1901, and that, in order to entitle the plaintiff to recover, the jury must find that the exact language of that article, or such part thereof as the jury under the instructions of the court shall find to be libelous and as are set forth in the declaration, was or were written, or authorized to be written, or published, or authorized to be published by the defendants, or one of them, and its verdict in any case can be against only such one, if either, of the defendants as is shown by the evidence so to have written or published, or authorized the writing or publishing of the same. And, in considering whether the defendants, or either of them, authorized the publishing of the said article, or any such part thereof, as set forth in the declaration, it will not be sufficient to find from the evidence only that the defendants, or either of them, had knowledge, in advance of the publication of the said article, that it was to be published and expected its publication; the jury must find from the evidence that the defendants or one of them, authorized, directed or participated in the publication.

The charge given by the court relating to this point is in the following language, Rec., 50:

> Therefore this article on the face of it, as a matter of law, is libelous, and its meaning libeled this plaintiff. The question for you to decide is whether these defendants have done it, or whether somebody else has done it. There are two theories upon which the plaintiff submits to you the proposition that the defendants

have libeled him. The first is predicated upon the testimony of Mr. Elliott, who gave testimony tending to show that the defendants procured him to publish this article after they knew what was in it, about the plaintiff; that the defendants had procured him to publish this article knowing what it contained with respect to the plaintiff, Mr. Talbott. If they did, it is immaterial whether they wrote it or not. If they knew what this article was going to be in advance, as the testimony of Mr. Elliott indicates, if they procured him to publish the article in so far as it referred to Talbott, then they are liable for it, although they did not write it themselves. But if, when you consider Elliott's testimony, opposed as it is by the testimony of the defendants, and perhaps other witnesses, you conclude that the fact of that matter was that these defendants, and neither of them, did in person go to Elliott's office before the publication of the article of December 8th, and that neither of them did actually procure him to publish that article before he published it, in respect of its allegations as to Talbott, then in that regard they are not responsible for the publication on that theory as submitted by the plaintiff.

In libel, if the language is clear and unambiguous, it is the province of the court to determine its construction and whether it is actionable *per se*.

> American and English Encyclopedia pleading and practice, Negby *vs.* Farrow, 60 Md., 158.

When this is carefully examined it will be found that it ought not to have been given in the form submitted because it unduly narrowed the field of appellants' legal liability and unduly burdens the appellee in respect of proof, and by its involved and ambiguous grammatical construction would inevitably confuse and mislead the jury.

All its essential elements to which under any view of the law appellants were entitled, were given to the jury by the general charge of the court, and it is thoroughly well settled that the trial court is not bound to charge in any case as prayed, if the law be plainly and correctly given in the general charge.

District of Columbia *vs.* Dietrich, 23 Appeals D. C., 577.
Ryan *vs.* R. R., 8th Appeals D. C., 542.
District *vs.* Wilcox, 4th Appeals D. C., 90.
District *vs.* Haller, 4th Appeals D. C., 405.
Robinson *vs.* Parker, 11th Appeals D. C., 132.
DeForest *vs.* U. S., 11th Appeals D. C., 458.

Some attempt is made in appellants' brief to criticise this charge, but when it is seen that when plainly by the court invited, no exception was reserved, it will at once appear that such criticism cannot be regarded here.

The charge is an admirable and absolutely accurate statement of the law of libel.

It in express terms and by necessary implication requires the jury to find that the libel as laid in the declaration was published by both the defendants, or if by one to hold only that one.

It carefully guards them from theoretical or inferential liability. It even goes so far in guarding their rights as to call express attention to the strong contradiction of Elliott on one of the vital points of the case.

The able counsel for appellant listened to that charge fresh from the heat and excitement of a fierce legal battle

and on the qui vive for errors; not only was this so, but when invited to except they did not do so. Why?

Obviously because they both felt that the charge was a model one; that it gave their clients every advantage to which they could be entitled and that the jury could not fail to understand it.

If counsel then thought the charge faulty, in any of the respects now claimed it was their plain duty when invited to do so to have called attention to them so that the court might, if deemed proper, have corrected them.

This court has constantly said that a general exception to a charge was not sufficient.

> But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of the law which they present, if the law arising upon the evidence is given to the court with such fullness as to guide correctly the jury in its findings as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not when taken with the rest of the charge have misled a jury of ordinary intelligence.
>
> Chicago & N. W. R. R. Co. *vs.* Whitton, 13 Wall., 270; Law Ed., 571.

A Fortiori. Will complaint be heard here when not only was no exception taken, but when counsel for appellants really declined to except?

The charge needs only to be read in its entirety to be not only vindicated but admired.

The case as disclosed by even this condensed record shows intense and natural bitterness on both sides.

The counsel for the plaintiffs in error omit to discuss the question arising from the evidence and distinctly given by the charge of the court, that no matter who wrote or caused to be written, the libelous article, if the plaintiffs in error or either of them caused it *to be circulated*, the one so doing was liable. There was abundant evidence that they hired a boy to circulate the paper in which the exact libel was printed at Rockville. *N'importe* who mixed the poison they laid it around, and the jury so found.

It shows (because the verdict is conclusive on these points) that the appellants for the purpose of revenge and for no other purpose took the law into their own hands and hired a man or men to write, print and publish the libel laid in the declaration, which is as bitter and malevolent one as was ever penned, and one justly pronounced to be such as matter of law by the learned trial justice; that they hired a boy to go to Rockville, the appellee's home, on the Sabbath day, to call out and proclaim on his very door step a charge so vile that if true it would have justified his social ostracism and made him a pariah in his honorable profession and subject to indictment in his own court for malfeasance in office; and this was not done for the welfare of the public, but this attempted assassination of appellee's reputation was undertaken with the same premeditation and malice aforethought as are the essential elements of the crime of murder of the body.

For this the law says they must pay smart money in the interest of the public and as a deterrent and warning to others. And so the jury dealt with the case.

It is upon this Record submitted that a fearless and able trial judge and an honest and intelligent jury (the two basic elements of an ideal American court of justice) have dealt with this case and with these appellants fairly and as they deserved.

ANDREW LIPSCOMB,
JOHN RIDOUT,
Attorneys for Defendant in Error.

PICKFORD *v.* TALBOTT.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 13. Argued October 26, 1908.—Decided November 30, 1908.

Crime and credulity are not the same and mere neglect on the part of a prosecuting officer to investigate the character of witnesses on whose testimony an indictment is based is not tantamount to deliberate design; and in a suit for libel brought by such an officer against the owner of a journal charging him with blackmail, evidence as to whether he had made such investigation was properly excluded as irrelevant, the court not having excluded evidence as to the plaintiff's character.

In this case the court below rightly held the defendant responsible for the publication of the libel.[1]

28 App. D. C. 498, affirmed.

THE facts are stated in the opinion.

Mr. Henry E. Davis, with whom *Mr. Samuel Maddox* and *Mr. H. Prescott Gatley* were on the brief, for plaintiffs in error:

The cross-examination of the plaintiff was being properly conducted when interrupted by the court.

The "good faith" of the defendant in error in procuring the Rockville indictment went to the very heart of the action. If it could have been made to appear by the admissions of the witness, testifying in his own behalf, that while State's attorney he was in league with the man Hudson and the insurance companies, in a scheme which his predecessor denominated "blackmailing," the jury would have made short work of the case when they retired to consider of their verdict; and it was impossible to do this except by probing the conscience of the witness through the medium of cross-examination.

As tending to show that he was not a man of good character, evidence of particular acts of misconduct would not have been admissible except in the way attempted—by cross-examination when he tendered himself as a witness in his own behalf.

The rule is now well settled that this may be done. Wigmore on Evidence, § 981, and cases there cited; *Eames* v.

[1] The syllabus in the report of this case below, 28 App. D. C. 498, on the question of responsibility, is as follows:

"A charge to the jury in a libel case is correct which in effect states that one who procures the publication of a newspaper article libelous *per se,* or the circulation of copies of a newspaper containing such an article, is liable to the person defamed, no matter who wrote the article; and that a principal is responsible for a libelous newspaper article written by his agent, if the agent's general authority was such as fairly carried with it the authority to express in the principal's behalf what the article contains."

Kaiser, 142 U. S. 491; *Griffin* v. *Henderson*, 117 Georgia, 383; Townshend on Slander, 669, § 406; Newell on Libel and Slander, 290, § 39; *Earl of Leicester* v. *Walter*, 2 Camp. 251; *Witherbee* v. *Marsh*, 20 N. H. 563; *Wilson* v. *Noonan*, 27 Wisconsin, 598; *Conroe* v. *Conroe*, 47 Pa. St. 198; *Varnum* v. *Townsend*, 21 Florida, 447; *Treat* v. *Browning*, 4 Connecticut, 409; *Williams* v. *Miner*, 18 Connecticut, 477; Odgers on Libel and Slander, Bigelow's Notes, §§ 304, 305.

The greatest latitude is and should be allowed on cross-examination, especially of a party to the suit, for the purpose of sifting the conscience of the witness, touching his accuracy of statements, veracity, and credibility; and even specific, extraneous offenses and other matters material to the issues may be inquired into, if they have any bearing thereon. 1 Greenleaf, § 446; 3 Jones on The Law of Evidence, § 826; Taylor on Evidence (8th ed.), § 1459; *Kirschner* v. *The State*, 9 Wisconsin, 137; *Hitchcock* v. *Moore*, 70 Michigan, 112; *Hay* v. *Reid*, 85 Michigan, 296, 307; *State* v. *Merriman*, 34 S. Car. 39.

The line of examination which was interrupted by the court was entirely material. If the defendant in error, vested with the power of destroying the character of his fellow citizens, undertook so to do upon the unsupported statements of a perfect stranger, into whose character he made no inquiry before using that power against plaintiffs in error, he manifested in himself á character so far below the standard as to make the injury to him proportionately less than would be the injury to a man whose character is normal.

In many of the later cases the rule has been modified to the extent that matter tending to mitigate damages, even though, at the same time, bearing in the direction of testimony tending to prove the truth of the libel, might be admitted as mitigating damages upon both the grounds above indicated, namely, first, as derogating from the character of the plaintiff, and, second, as reducing the malice involved in publishing the libel. Had the testimony here excluded been admitted, it would have been a fair and forcible argument to

make to the jury both that the defendant in error, being a man so reckless of regard for his duty and the rights of others, had not the character entitling him to the solace for its injury, which a man of normal character might demand, and also that the plaintiffs in error, smarting under the infliction of an injury growing out of such recklessness, could not be held guilty of the extent of malice to be imputed to one without any such instigation publishing a libel against another.

The trial court in the matter of the rule that the truth cannot be given in evidence on the issue of not guilty, gave undue weight to the case of *Underwood* v. *Parkes*, 2 Strange, 1200. See *Bush* v. *Prosser*, 11 N. Y. 362; *Van Derveer* v. *Sutphin*, 5 Ohio St. 302; *Huson* v. *Dale*, 19 Michigan, 29, 30.

The result of the authorities is that while in impeaching the character of a witness the inquiry is, in general, limited to his general reputation, yet where the feature or trait of character sought to be inquired into touches, or is involved in, any issue in the case, such feature or trait may properly be gone into, especially where the witness is a party and the feature or trait in question is directly pertinent to the gravamen of the action or the peculiar ground of damage alleged.

In a case of libel involving the character of the plaintiff, any matter tending to show that his character is of a sort not susceptible to damage is clearly pertinent; and how much more pertinent is an inquiry tending to show that in respect of a particular character, as that of probity in office, the plaintiff lacks it; and that he lacks it is, as of course, better shown by proof of specific acts of dishonor, brought directly home, than by proof of the general estimation in which he may be held by those ignorant of such acts. In the case at bar the interrupted attempt was to show that the defendant in error, by reason of his conduct in the very matter in controversy, was not entitled to and did not have the peculiar character in respect of which he claimed to have been injured, namely, a character for probity in office; and the refusal to permit this matter to be gone into on cross-examination

worked injury to the plaintiffs in error so manifest as of itself to call for a reversal of the judgment.

Mr. Andrew Lipscomb and *Mr. John Ridout* for defendant in error:

The line of interrogation was not true cross-examination because not responsive to the direct examination.

It was obviously useless because the court cannot suppose that the defendant in error would have admitted that he had acted in bad faith in submitting the matter to the grand jury and preparing an indictment upon their presentment so that no harm to plaintiffs in error ensued although palpable injury to defendant in error did result because he was thereby precluded from giving his version of the finding of the indictment.

Upon familiar principles the court cannot deal with the supposed error because there is nothing in the record in the nature of an offer to prove any definite fact by the witness, so that the court cannot tell what the effect of the ruling was except that it can be plainly seen that it was more injurious to defendant in error than to plaintiffs in error.

This clearly appears by Mr. Lipscomb's statement in the record that he was willing the so-called cross-examination should proceed on the lines indicated.

It was a clear attempt to prove by cross-examination and in advance a part of the defendant's case in chief.

It is well settled that this cannot be done over objection, either by the court or by counsel. Jones on Evidence, §§ 820, 821, 837; *Philadelphia Ry. Co.* v. *Stimpson*, 14 Pet. 461; *Northern Pacific Ry. Co.* v. *Urlin*, 158 U. S. 271.

The "English rule" allowed practically a cross-examination of a witness on the whole case, but it is by the "American rule" equally well settled in a large majority of States and all the Federal courts that it is limited to matters brought out by the direct. *Houghton* v. *Jones*, 1 Wall. 702; *Philadelphia R. R. Co.* v. *Stimpson*, 14 Pet. 448.

It was also plainly an attempt to prove justification without pleading it, and this as the record discloses, was the controlling reason for the *sua sponte* ruling by the court.

Justification cannot be proved in this jurisdiction unless specially pleaded, and here the only plea was the general issue. The doctrine on this subject is stated by Mr. Newell in his work on Libel and Slander, §§ 68 to 76 and the notes thereto.

The doctrine briefly stated and established beyond any peradventure is that "the truth" or "justification" must be specially pleaded and with sufficient precision and particularly to enable the plaintiff to know precisely what is the charge he is to meet. *Richardson* v. *State*, 66 Maryland, 205; *Smith* v. *Tribune*, 22 Fed. Rep. 13, 118; *Woodruff* v. *Richardson*, 20 Connecticut, 238; *Knight* v. *Foster*, 39 N. H. 576; *Smith* v. *Blanchard*, 42 N. H. 137.

The scope and extent of the cross-examination like the order of proof are within the sound judicial discretion of the trial court, and such rulings will not be disturbed unless they clearly amount to an abuse of that discretion.

The bad character either generally or in the office as State's attorney of defendant in error may be shown, but such showing should be made by, and only by independent proof, as part of defendant's case. Such proof was not offered and at the argument counsel for appellants admitted that it could not be obtained. This admission sustains the contention already made that the so-called examination would have been not only useless but injurious to appellants.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action for libel brought in the Supreme Court of the District of Columbia. The plaintiff in the action, defendant in error here, secured a verdict for $8,500, upon which judgment was entered. It was affirmed by the Court of Appeals. 28 App. D. C. 498.

The facts are set out at some length in the opinion of the Court of Appeals, and need not be repeated. It is enough to say that defendant in error Talbott was, at the time of the publication of the libel, State's attorney for the county of Montgomery, in the State of Maryland. During his incumbency of that office an indictment was found upon the testimony of one Hudson, charging plaintiffs in error with the crime of arson, for having set fire, it was charged, to a building owned by them in Montgomery county. The building was insured for $30,000, of which, after controversy, there was paid $21,000. The libelous article was published in a paper published in the city of Washington, called the Sunday Globe, and copies circulated in the county of Montgomery, Md. The article was entitled "History of a Crime in which District Attorney Talbott, of Maryland, Enacts a Leading Role." It accused Tabott of entering into a "criminal scheme" with Hudson, and a man by the name of Hopp, to blackmail Pickford and Walter, plaintiffs in error, which "culminated" in the "nefarious indictment," and, in order that the actors in it might be "unmasked," the facts were said to be stated as they were learned "after a thorough investigation." Certain facts and instances were detailed, among others the association of Hudson and Hopp, an attempt by the latter to obtain money from Pickford to stop the prosecution of the indictment, the payment of Pickford to Hopp of certain marked bills, the arrest of Hopp, the advancement of money by Talbott to Hudson, the demand of Pickford's attorney for trial of the indictment, and motions to continue the same by Talbott, and the final dismissal of the same by him when the court peremptorily ordered him to proceed. The article concluded with these words: "The district attorney [Talbott] thereupon, by leave of the court, entered a *nol. pros.* and the great conspiracy thus came to an inglorious end."

It appeared from the evidence that the predecessor in office of Talbott (Alexander Kilgour) had refused to prosecute plaintiffs in error, and to him, plaintiff in error, Pickford, in his

testimony, attributed the declaration that the "whole thing" was a "blackmailing scheme." Kilgour, in his testimony, stated that he did not recall using the word "blackmailing," but said that in all probability he had done so, and "that it was an effort on the part of the insurance companies to use his office for the purpose of collecting their money."

The declaration contained four counts, the first of which was taken from the jury. In all of them, however, Talbott alleged his incumbency of the office of State's attorney for the county of Montgomery, and that, as "such officer, he was always reputed amongst the citizens of said county" and of the United States, "and deservedly so reputed, to be upright, honest, just and faithful in the performance of the public duties imposed upon him by his oath of office and the laws of the State of Mayland." Injury to his good name and credit was alleged. The defendants pleaded the general issue.

At the trial, Talbott being on the stand, testified that he had investigated the crime for which Pickford and Walter were indicted, and that it had been brought to his attention by a man by the name of Thompson, "in a vague and indefinite letter," which was followed by another letter, in which it was stated the crime was arson. He testified that Thompson was a newspaper man, whom he had never seen before, and on whom he called in response to the second letter. He also testified that Thompson told him that Hudson would be a witness, but did not tell him who Hudson was, but that he (Hudson) was thoroughly in touch with the situation. Subsequently he went with Thompson to see Hudson, taking a stenographer with him. He further testified that he did not know whether he asked Thompson if the matter had been brought to the attention of Mr. Kilgour. And further testified that the fire occurred during Kilgour's incumbency, and that he had not inquired of Kilgour about it. He also testified that the fire occurred in September, 1897, two years and four months before he qualified. He testified further that both Thompson and Hudson were strangers to him. At this point

the court interrupted the examination, and the following occurred:

"The COURT. On what line are you pursuing this inquiry?

"Mr. MADDOX. I am going to show, if I can, the absence of good faith in this indictment on the part of the district attorney.

"Thereupon, after discussion and explanation on the part of counsel for defendants, the following occurred:

"The COURT. I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth without pleading it. . . . You may prove anything Pickford heard the witness say, before the article was published.

"Mr. MADDOX. I want to prove by this witness first by his own testimony in connection with the transaction complained of in this article, that he is not a man of good character, which he says he is.

"Mr. LIPSCOMB. I do not object *by our* [to your] asking him that, Mr. Maddox.

"Secondly. I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy.

"The COURT. You may prove anything Pickford heard the witness say before the article was published.

"Mr. MADDOX. I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury and whether he investigated the character of the man.

"The COURT. Under your statement that you propose by that line of testimony to prove that the district attorney acted in bad faith, I will not hear it, because I do not think it is relevant for that purpose."

This ruling is assigned as error here, as it was in the Court of Appeals, and it is attacked on the ground that "the 'good faith' of the defendant in error in procuring the Rockville indictment went to the very heart of the action." And counsel

supplement this by saying that "if it could have been made to appear by the admission of the witness, testifying in his own behalf, that while State's attorney he was in league with the man Hudson and the insurance companies, in a scheme which his predecessor denominated 'blackmailing,' the jury would have made short work of the case when they retired to consider their verdict; and it was impossible to do this except by probing the conscience of the witness through the medium of cross-examination." It is obvious, by "good faith," counsel mean the truth of the charge. But in the subsequent discussion they seem to make it equivalent to good character, and contend that the examination was in rebuttal of the allegation of the declaration that defendant in error "was upright, honest and just" in the performance of his official duties.

For the right to show the character of the witness counsel adduce many cases, and assert besides the freedom that may be exercised in cross-examination. But the counsel who tried the case marked a distinction between the character of the witness and his good faith, and on that distinction the court made its ruling. It will not do now to identify them and claim a right that was not denied. The attorney for defendants (plaintiffs in error) was careful to say that he made no objections to questions directed to character, and the final purpose as declared had no reference to that. But what is the testimony and what is the argument built upon it? Counsel who conducted the defense said: "I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury, and whether he investigated the character of the man." It is now argued that this was an inquiry of a specific fact affecting the character of Talbott, showing that he exhibited a "reckless disregard of the rights of others," and this, taken in connection with certain facts mentioned, "shows," it is said, "a readiness on the part of the defendant in error to smirch the character of plaintiffs in error amounting to recklessness, such that if the defendant in error were at

bar for his conduct in the premises would be held to show malice of the degree calling for punitive damages." And it is urged, after considerable discussion, that "the interrupted attempt was to show that the defendant in error, by reason of his conduct in the very matter in controversy, was not entitled to and did not have the peculiar character in respect to which he claimed to have been injured, namely, a character for probity in office. . . ."

We are not able to concur in the conclusion. A charge of using an office to procure an indictment as part of a conspiracy to blackmail could not be justified or in any degree excused by the facts offered to be proved. One might be a careful and zealous officer and not stop to investigate the characters of prosecuting witnesses. Besides, the charge was not of careless credence of an accusation of crime against innocent men, but of a scheme deliberately planned, through a "nefarious indictment," to use the words of the libel, to extort money from innocent men. We think, therefore, that the trial court was right in rejecting the proffered evidence as irrelevant. We could not hold otherwise, unless we should hold that crime and credulity are one and the same thing, and we repeat that the mere neglect to investigate the character of witnesses is not equivalent to such disregard of the rights of others as to be tantamount to deliberate design, certainly not a deliberate design to blackmail. We say "mere neglect," because this was all the offer amounted to. It was already in evidence for what it was worth that Hudson was a stranger to Talbott.

The second assignment of error is based upon the contention that the court erroneously instructed the jury in regard to the responsibility of the plaintiff in error for the libel.

It is not necessary to give the testimony. We will assume that it might have been contended that plaintiffs in error were not connected with either the printing or publishing of the first article or the second (there were two), or with either. The instruction asked and the instructions given by the court

END

OF

CASE